DEVELOPMENT OF THE LAW OF EVIDENCE IN PAKISTAN AND BANGLADESH WITH SPECIAL REFERENCE TO WITNESS TESTIMONY

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Abstract

The thesis aims to look into the law of witness testimony in Pakistan and Bangladesh. In the last decade Pakistan has launched an Islamisation programme affecting many areas of life including witness testimony. The changes brought about in Pakistan in the area of witness testimony through recent legislation from 1979 onwards are discussed, and compared with the status quo maintained in the same area by Bangladesh, formerly East Pakistan, for more than a century. The case law of both countries are used as the primary source in understanding the development of the law of witness testimony.

The finding of the thesis is that although in theory Pakistan has moved away from the century old law, it in fact still follows in practice the old law in a new framework of Islamic law. This is evident specially as there is very little difference between the practice in Pakistan and Bangladesh. The reason could be twofold : a) The society in Pakistan is yet not ready to accept the changes brought in the name of Islam or b) the age old law enunciated during the British period in the form of legislation, and thereafter practised throughout, was very much Islamic. This thesis is mostly built up on the latter rationale. Through the discussion and reference to case law, the law of witness testimony that has evolved so far is also given a comprehensive shape.

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CONTENTS

CHAPTER 1

1. Introduction

This chapter seeks to discuss the purpose and justification of the thesis. Thereafter a brief picture of the general law of evidence, general Islamic law of evidence and the law of evidence as applied in Pakistan and Bangladesh is laid out. In the outline of the general law of evidence, some of the basic rules that apply to all modern legal systems are discussed, keeping in view that these rules are similar to the rules applicable in Pakistan and Bangladesh, and to some extent similar to the notion of Islamic law of evidence. As the focus of the thesis is on witness testimony, more space is devoted to the discussion of witness testimony than other general rules of evidence.

1.1 Purpose of the Thesis

The proposed thesis attempts to analyse the development of the law of evidence concerning witness testimony in Pakistan and Bangladesh. The codified law of evidence applicable in India, Pakistan and Bangladesh was the Evidence Act, 1872 with certain amendments added from time to time to suit the needs of each country, until Pakistan changed its position in 1984. The Evidence Act, 1872, continues to be the guiding law of evidence in India and Bangladesh.

Pakistan claims to have introduced Islamic law of evidence by proclaiming Qanun-e-Shahadat in 1984. In this context, the study shows to what extent Pakistan has introduced Islamic law of evidence as opposed to it's predecessor, the Evidence Act. The study will be primarily concerned with some of the aspects of

witness testimony that are changed; the study will also examine whether those aspects of the Evidence Act regarding witness testimony is in itself unIslamic or whether its application resulted in unIslamic decisions. This seems important because the sections of the Evidence Act,1872, which Pakistan has amended, deleted, introduced and rearranged as the Qanun-e-Shahadat, 1984 are crucial. This rearrangement of new articles is considered by the proponents of the Qanun-e-Shahadat to be Islamic. Before the Evidence Act was replaced in 1984 it was affected by the introduction of the Hudud Ordinances in 1979. Those provisions that are in conflict with the Evidence Act or practices of the Court are also discussed to show their differences, and the importance of such change. It is to be noted that Islam does not object to principles that are not inherently unislamic. Therefore the system is flexible enough to expand and formulate rules.

The similarities and differences are brought on record by analysing reported cases of Pakistan and Bangladesh. Any relevant points made by the jurists in Islamic law generally or specifically are in most cases compared with the law in Pakistan and Bangladesh at the same time. The work takes into account more criminal than civil cases. This is because the change made in Pakistan in the law of evidence has greater impact on criminal cases than civil cases. It may be mentioned that while dealing with the law of evidence, only some aspects of witness testimony are emphasised. Section 118 and 119 equivalent to article 3, section 134 equivalent to article 17, section 32(1) equivalent to 46(1) read with the new proviso of article 71, sections 29 and 30 equivalent to articles 42 and 43 and a new article 44 of the

Evidence Act and the Qanun-e-Shahadat are discussed. The articles of the Hudud Ordinances relating to proof are also discussed. There are some other provisions of law discussed in relation to the above few rules. It would be impossible within the confines of the present study to deal with all aspects of witness testimony.

The study is confined to case law from the period of 1979 to the present in Pakistan and from 1971 until the present in Bangladesh. The reason for this is that the Islamisation process affected the law of evidence from 1979 onwards in Pakistan. Bangladesh became independent in 1971. The Indian case law on evidence is not discussed except for referral point. The reason for discussing only Pakistani and Bangladeshi case law is that, i. both of them were the same country before, ii. both the countries have a Muslim majority, iii. the codified laws of evidence in its amendment and its application in the Courts of both wings of Pakistan were the same before 1971, as opposed to India, and iv. one would argue that Islamisation in Pakistan, in whatever remote manner, affects Bangladesh. This is discussed in chapter two.[1]

This study is not to discuss or elaborate the Islamic law of evidence as such. Relevant rules are mentioned at times to show the similarities or dissimilarities between the Islamic law with the law as applied in Pakistan and Bangladesh. The cases of the Shariat Court of Pakistan are cited to show the position in Islamic law. Where the case law differed from the traditional Islamic law this has been pointed out. The cases from the Courts in Pakistan

[1] see chapter 2.3

and the Courts in Bangladesh are discussed as substantiating each other on certain issues concerning witness testimony where no real difference lies between them. When the cited case law relies on a pre 1971 in Bangladesh and on pre 1979 in Pakistan case law. It is most of the time carefully mentioned to show the antiquated origin of the proposition. In the process, an exposition of the law of witness testimony from the case law will be attained. The number of reported cases is much higher in Pakistan compared to Bangladesh. There may be no case law at all from Bangladeshi Courts on certain issues.

Often, when available, reference is made to compare the position in Pakistan and Bangladesh with a third country. This kind of comparison helps to clarify or expand the view on a particular issue. It is to be noted however that there is no intention to draw a comparison with any particular country.

Because Pakistan claims to have introduced Islamic law of evidence, it is thought to be worthwhile to look briefly at the Islamic law of evidence as it was before the Evidence Act,1872, was codified, to see in what form was Islamic law of evidence applicable then. It will give a summary picture of Pakistan and Bangladesh regarding their development in the area of evidence. Though Hindu law and laws of other groups were in force during the Muslim reign in India, this study does not deal with them as time and space do not permit.

The Hedaya is taken to be a guide for the Hanafi school of thought, and it will be cited as the most important Islamic source for this work. The judges of Pakistan often refer to the Hedaya. The comprehensive nature of Hedaya is discussed in chapter

two.[2] There is an initial presumption that the Muslims in the Indian subcontinent are guided by Hanafi school of thought, although followers of other schools exist.[3] The study also at times makes reference to three other schools of thought, and also to propositions varying from the Hanafi view. This would be consistent with Islamic law as Talfiq (amalgamating or patching of ideas of different schools of thought) and Takkhayyur (considering the view of a certain jurist better than the other jurists) are an accepted norm for reformist legislators in Islamic countries.

The aspect of female witness testimony is dealt with separately. References from Qur'anic Ayah (verses of the Qur'an) and Prophetic Hadith are made in this respect to analyse it from Islamic legal point of view. This area is controversial in Islamic law. Pakistan has legislated on female testimony according to the Islamic law. It is thought proper to look at those controversies specifically. It is resented by many women in Pakistan that their position is reduced to a negligible condition by introducing Hudud Ordinances, where the woman is barred from becoming a witness for Hadd punishment, and by article 17 of Qanun-e-Shahadat which equates the testimony of two women to that of one man in certain matters. This area is also of concern to all Muslim women whether or not they are directly affected by that law, as Pakistani women are.

The study is divided into seven chapters. The study begins with the first chapter as an introduction. It contains the purpose and

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[2]see chapter 2.1

[3]Mahmood, Tahir, *Family Law Reform in the Muslim World*, Bombay, 1972, p. 247

the justification of the thesis, a brief general outline of the law of evidence as appears in different text books in the west, the Islamic law of evidence and the law of evidence as in Pakistan and Bangladesh. The second chapter gives a brief background of the position of Islamic law in Muslim India, a brief summary of the legislative enactment on law of evidence, in the form of Regulations and Acts passed from time to time by the British Government in India until the adoption of the Evidence Act, 1872 by India, Pakistan and Bangladesh and discusses briefly the re introduction of Islamic laws in Pakistan. It moves on to the analytical chapters following it. The following four chapters specifically deal with some of the changes on witness testimony brought in by the Qanun-e-Shahadat,1984, and the Hudud Ordinances, 1979. The third chapter is on the qualification of witnesses. This chapter tests the competence of a witness' testimony, the essentials of which are understood to be much more severe in Islamic law than the general law of evidence. It examines how case law varies in its dealings with the competence of a witness, and how much the criteria of the case law is Islamic in essence. The fourth chapter examines the competence of different kinds of witnesses and their testimony. It makes an attempt to define and amplify different kinds of witnesses mentioned in the case law. The fifth chapter is on the quantum of proof --- the required number of witnesses, confession of the accused and dying declarations made in the presence of the witnesses. This chapter in particular shows that proof of a case could be direct or indirect due to necessity. The rule of necessity may also allow the quantity of the witnesses to be reduced even in direct oral evidence. The sixth chapter is on female witnesses,

their legal status in Islam and the right conferred on them by the jurists through the ages, the cases of Shariat and High Court, arguments for against the admissibility of their testimony etc. It is followed by a seventh chapter with conclusion.

Arabic words are used interchangeably with the English equivalent at times. The transliteration of the Arabic words is written as closely as possible to the Arabic pronunciation. Where there is a quotation in which the transliteration differs from the standard considered in this study it is left to that but when it is paraphrased the transliteration of this study is followed. The names of statutes with different transliterations is also left to its own version, but while discussing the articles or clauses of the statute the transliteration of the study are followed.

The Arabic words pertaining to the law of evidence is written with capital letters and underlined. All other foreign words are written in small letters and underlined. Maxims and Latin words are italicised. Italics also used to show emphasis of a statement made in the course of argument.

At the end of the study are a bibliography, a table of statutes, a glossary of foreign words with English meaning, a list of abbreviations relevant to this subject, and two tables of case law of Pakistan and Bangladesh.

1.1.1 Justification of the Thesis

It appears that this subject *per se* has not been dealt with separately by any writer. It seems that this subject is more relevant after the introduction of the Qanun-e-Shahadat and the Hudud laws in Pakistan as part of the Islamisation programme. In this context the study seeks to analyse the status and position of

witness testimony as it appears in the statute and case law of Pakistan and Bangladesh. The task is to collect scattered and scanty material from a large *corpus* of reported case law and put it together in one place so that it becomes one coherent study of the rules regarding witness testimony.

The second chapter is meant only to give a summary of the history of Islamic law of evidence in India, introduction of the Evidence Act, 1872, and the re introduction of Islamic law in Pakistan. They do not form the thesis. A detailed survey of any one of these topics would lead to a thesis in itself. This chapter is therefore confined to a summary only.

It is justified to look into the reported case law in the analytical chapters, as the issues discussed are aptly mentioned there. It serves as an exposition and analysis of the law. The other reason is that the reported case law has not been treated analytically so far.

The different issues that will appear in the analytical chapters probably would be worthy of separate study. It must be noted that those different issues, e.g. child witness, expert witness etc., are discussed individually from the perspective of the competency of a witness.

This study does not aim to enlarge the philosophical discussion on the ideas and concept of witness testimony. It concentrates on the legal findings and at times reasons for the individual behaviour of witness testimony.

Before going into the history of law of evidence and the analytical chapters following it a brief discussion is made on the general principles of law of evidence as appears in various text

books, the Islamic law of evidence and the law of evidence in Pakistan and Bangladesh.

1.2 General Principles of the Law of Evidence

The word evidence is derived from the Latin word evidens or evidere that means to show clearly, to make clear to the sight, to discover clearly, to ascertain, to prove, etc.[4]

According to Fitzjames Stephen the word evidence may mean testimony, relevancy, exhibiting things in the Court, and facts proved to exist by the exhibition of things.[5] It may also be defined as a method, means or procedure prevailing by means or procedure of which some fact, documents, or condition of things relevant to the issue in a trial or an action is proved, or disproved, and it includes all legal means allowed, which tend to either prove or disprove the fact in issue; but it does not include mere arguments.[6]

Evidence, according to Jeremy Bentham(1748-1832A.D.), is some matter of fact or statement regarding some matter of fact that is presented to the judge to produce in the judge's mind persuasion of some other material fact necessary for decision.[7]

The main principles that underlie the traditional law of evidence are

1. evidence must be confined to the matter in issue,

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[4]Field, C.D., The Law of Evidence in British India, 5th ed., Calcutta and London, 1894, p. 3

[5]Montrose, J. L., 'Basic Concepts of the Law of Evidence' in *Evidence and Proof* edited by William Twining and Alex Stein, Aldershot et al, 1992, pp. 347-375 at p.350; Stephen, James Fitzjames, *An introduction to Indian Evidence Act*, Calcutta, 1872, 2nd imp. 1904, p. 4

[6]Kinney, Alex, *Student's Guide to the Law of Evidence in India*, Calcutta, 1914

[7]Postema, Gerald, 'Facts, Fictions and Law Bentham on the Foundations of Evidence' in *Facts in Law* edited by William Twining, Wiesbaden, 1983, pp. 38-64 at p. 39

2. hearsay evidence must not be admitted and

3. best evidence must be given in all cases.[8]

John Henry Wigmore's (1863-1943 A.D.) rules are more elaborate. He has classified the rules as follows[9]

A. Rules of Probative Policy

1. Exclusionary Rules, which exclude evidence on grounds of relevancy or of policy related to their probative force;

2. Preferential Rules, which require one kind of evidence to be offered in preference to any other;

3. Analytical Rules which require certain kinds of evidence to be subjected to rigid scrutiny, notably cross examination

4. Prophylactic Rules, which apply certain measures in advance, such as formalities governing wills and contracts;

5. Quantitative Rules, which require certain evidence to be produced in specified quantity, e.g. corroboration or that which make certain kinds of evidence sufficient;

B. Rules of Extrinsic Policy, i.e. rules based on policies independent of probative value, notably:

6. Rules of Absolute Exclusion, such as evidence obtained by illegal search or confession to a police officer;

7. Rules of Conditional Exclusion, i.e. providing for the exclusion at the option of the party exercising a privilege, such as the lawyer client privilege.

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[8]Hanif, Dr. C. M., *The Qanun-e-Shahadat (The Islamic Law of Evidence), 1984*, Lahore, N Y, p. 26

[9]Wigmore, John H., *A Student's Textbook of the Law of Evidence*, Chicago, 1935, pp. 27-51

Evidence may also be excluded apart from its probative value if its production would involve preponderant vexation, expense or delay in the individual case, judged by the standard of utility.[10] William Twining suggests about the above categorisation by J. H. Wigmore that only quantitative and preferential rules could be explicated with notions of weight, but for the most part these rules do not directly require that a particular weight should be accorded to a particular class of evidence. This view, he says, is shared by almost all modern writers on evidence.[11] Sopinka and others are of the view that the rules of evidence are not only value accommodated in the search for truth, but are designed to enhance efficiency of the trial process itself. The fundamental principle that the evidence presented to the Court must be relevant to the issue ensures that the Court is not distracted by collateral matters. The collateral fact rule which limits the scope of evidence that can be presented in testing the credibility of a witness seeks to ensure trial efficiency.[12] In the interest of justice, the exclusionary requirement must be confined to rules of practice, for there are risks inherent in placing excessive reliance on certain kinds of uncorroborated evidence, or on evidence of previous convictions, similar facts, etc.[13]

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[10]Twining, William, 'Rule-Scepticism and Fact-Scepticism in Bentham's Theory of Evidence' in *Facts in Law*, Wiesbaden, 1983, pp. 65-84 at p. 76; Bentham, Jeremy, *A Treatise on Judicial Evidence* London, 1825, pp.229-30; Holdcroft, David, 'Relevance in Legal Proof' in *Facts in Law* edited by William Twining, Weisbaden, 1983, pp. 127-144, at p. 142; Zuckerman, Adrian, 'Relevance in Legal Proceedings' in *Facts in Law*, Weisbaden, 1983, pp. 145-155 at p. 152 referring to Bentham, Introductory View of the Rationale of Evidence, 6 Bowring ed., 1843, 90; Rationale of Judicial Evidence, 7 Bowring ed.,335

[11]Twining, 'Rule-Scepticism.....' 1983 at pp. 74-5,

[12]Sopinka et al, *The Law of Evidence in Canada*, Toronto, 1992. pp. 2-3; Cohen, L. Jonathan, 'Freedom of Proof' in *Facts in Law* edited by William Twining, Wiesbaden, 1983, pp. 1-21 at p. 2

[13]Cohen, 'Freedom of .....' 1983 at p. 14

William Twining while explaining the exclusionary rules, refers to Jeremy Bentham and Jeffrey Gilbert. According to Jeremy Bentham, exclusion of any evidence requires justification, because evidence is the basis of justice. Exclusion of evidence would result in exclusion of justice. There is the understanding that most testimony is true. Rigid exclusionary rules would tend to exclude much information that is reliable; even false evidence is better than the absence of evidence: the former may be useful _____ for example in identifying inconsistencies or as "indicative" evidence leading to other, better evidence.

William Twining argues in favour of exclusionary rules. He says, concerns for procedural fairness, giving a higher priority to other social values than the pursuit of truth in adjudication, minimising official abuse of power and giving credence to what the legal profession claims to be the lessons of experience are the main, but by no means the only kinds of reason that are typically advanced to justify the retention of some formal rules of exclusion.

The general theory is that the best evidence is to be given following the rules of relevancy, i.e. the best evidence within the admissible limits of the evidence. Jeffrey Gilbert's simple comprehensive theory of judicial evidence founded on the Lockean theory of knowledge gives the definition of the best evidence. His theory is "That a Man must have the utmost Evidence, the Nature of the Fact is capable of; for the Design of the Law is to come to rigid Demonstration in Matters of Right, and

there can be no Demonstration of Fact without the Best Evidence that the nature of the thing is capable of....."[14]

It seems however much the law of evidence may be value accommodated and however much the best possible evidence is procured, the judgement may not always reflect the truth of the matter. Mark Ockelton explains that the prime purpose of the judicial proceeding is not to discover the truth, although it is desirable that it tends to coincide with the truth. He says that the adversary system of trial is not particularly well adapted to discovering the truth, and comparisons with scientific and historical fact-finding are not really appropriate. For the finding of facts the judge determines rather than discovers the fact. The judgement is required not to be a true but a firm one.[15]

1.2.1 Purpose of Witness Testimony

Testimonies of witnesses are required to present evidential facts for establishing or inferring material facts.[16] When a witness is called, sworn in, and answers questions, his statements are called testimony.[17]

Witness-oriented evidence is prepared to avoid what is hearsay.[18] The presence of the witnesses in open Court places the evidential facts that suffice or fail to suffice for a verdict of guilt against the accused, so that any individual can assess their probative

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[14]Twining, 'Rule-Scepticism.....' 1983 at pp. 70 and 78-80

[15]Ockelton, Mark, "Comments on John Jackson's 'Questions of Fact and Questions of Law' in *Facts in Law* edited by William Twining, Wiesbaden, 1983, pp. 101-7 at p. 107

[16]Zuckerman, Adrian A. S. 'Law Fact or Justice' in *Boston University Law Review*, May & July, 1986, Vol. 66, No. 3&4, pp. 487-508 at pp. 488-9

[17]Ferguson et al, *Legal Aspects of Evidence*, New York et al, 1978, p. 14

[18]Stein, Alex, The Law of Evidence and the Problem of Risk-Distribution, Ph.D. Thesis, London University, 1990, p. 43

value for themselves.[19] The best available witness is and should always be preferred.[20] For admitting witness testimony the witness has to be competent. The general requirement of understanding of the fact in issue seems to be part of all legal systems. What is proved directly by the evidence in Court involves for the most part asking whether witnesses can be believed in their testimony on what they did or perceived.[21] Jonathan L. Cohen points out that the assumption of a universal cognitive competence is currently under serious challenge.[22] It may be that the epistemological optimism of the seventeenth century and the Enlightenment is beginning to crumble, and the failures to solve economic and political problems and problems of industrial ecological growth,[23] along with a widespread interest in the psychology of the irrational or even the backlash of popular feeling against the whole enterprise of science, are reflected in a tendency to impose rather pessimistic interpretations on experimental data about ordinary human reasoning powers.[24]

1.3 Islamic Law of Evidence

Islamic law and Sharia are often interchangeably used. Sharia is a broader concept including ethical principles which are not

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[19]Cohen, 'Freedom of .....' 1983 at p. 10

[20]Stein, 1990, p. 49

[21]Jackson, John D. 'Questions of Fact and Questions of Law' in *Fact in Law*, edited by William Twining, Wiesbaden, 1983, pp. 85-100 at p. 90

[22]Cohen, 'Freedom of .....' 1983 at p. 2

[23]It is true of Pakistan and Bangladesh also. Industrial ecological growth in the West is balanced against these countries taking the same turn.

[24]Cohen, 'Freedom of .....' 1983 at p. 16

provided with definite legal sanction.[25] Islamic law of evidence consists of both witness testimony and general proof[26] with more emphasis to the former.

There is disagreement amongst the jurists as to whether general proof can be applicable to criminal matters of Hudud. General proof is a means by which truth is manifested. Evidence is necessarily limited to confession of the accused or witness testimony for a Hadd offence.[27]

The Shahada or testimony is one of the most important institutions within the system of evidence and the judicial organisation of Islamic law. In Islamic law, testimony of witnesses is the best proof. Written testimony has always been looked upon with disfavour by judicial practice and doctrine. When written material was widely used in legal matters and regular clerks were appointed to tribunals, the contents of public and private documents were proved not so much by the text itself as by the witnesses who attested the documents. The legal documents, private or notarised, had to be witnessed by at least two persons. Judgements had to be witnessed as well.[28] The reason perhaps is the jurists managed to avoid the Qur'anic injunction towards written documents [e.g. Sura 2:282] by interpreting it as a simple recommendation.[29]

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[25] Breiner, Bert F., Two Papers on Shariah, *Centre for the study of Islam and Christian-Muslim Relations*, Selly Oak Colleges, Birmingham, April 1992, pp. 10-11

[26] For details see Mahmud, Abdulmalik Bappa, *Supremacy of Islamic Law*, Zaria, NY, pp. 66-113.

[27] Salama, Dr. Mamoun M., General Principles of Criminal Evidence in Islamic Jurisprudence' in *The Islamic Criminal Justice System* edited by M. Cherif Bassiouni, London et al, 1982, pp. 109-123 at pp. 110-1

[28] Khadduri, Majid, *The Islamic Conception of Justice*, Baltimore and London, 1984, p. 148; Mahmud, NY, pp. 86-7

[29] Wakin, Jeanette A. (ed.), *The Function of Documents in Islamic Law*, Albany, 1972, p. 6

To be competent in Islamic law, a witness must possess maturity, reason, memory, speech, visual and audible perception, good character, authentic knowledge of the issue, and faith in Islam. Within the juristic debate there are exceptions to all the above conditions except reason, memory and good character.[30]

Islamic law is to a certain extent based on the theory of corroboration. Within Hudud it seems that the greater the gravity of the crime within the Islamic concept of a society, the greater is the weight given to the corroborating testimony of a specified number of witnesses. The crime of Zina (similar to adultery), as laid down in Sura 4:19-20 and 24:4, requires four witnesses of just character in order to be proven. In all other cases, a minimum of two men or one man and two women are considered satisfactory by the jurists according to Sura 2:282.[31] This does not mean that a decision would weigh in favour of a person who brings more witnesses. The justness of the witnesses is of utmost importance.[32] The testimony of each witness of just character must be supported by another witness of just character and the justness of character of each other witness must be confirmed by another person of just character called the Muzakki. The qualifications of witnesses are considered of utmost importance to insure impartiality and justice in the judicial process.[33]

The essential elements of proof are ____

1. admission by the accused as the primary evidence,
2. the testimony of two just witnesses, and

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[30]Salama, 'General Principles .....' 1982 at pp. 116-118; Mahmud, NY, pp. 72-80 and 106-107

[31]Khadduri, 1984, p. 148; Mahmud, NY, p. 108

[32]Mahmud, NY, p. 84

[33]Khadduri, 1984, p. 148, Mahmud, NY, pp. 73-74

3. the oath of either party and the testimony of one witness.

In Islam, the standard of substantive justice, consisting of a set of religious and moral values highly esteemed in the public eye, is far from capable of being realised by the judicial process, despite the stress laid on the qualifications for the office of judge and the meticulousness of the law of evidence.[34] In effect, the harshness of Islamic Criminal law and penalties is mitigated by the rules of evidence. Morally, it is regarded that if a witness lies in front of the Qadi it does not exempt him from the greater punishment awaiting for him from the Almighty.[35] The legal and moral values are in coherence with one another.

1.3.1 Islamic Law of Witness Testimony

The Shahada or testimony of a Shahid or a witness is a declaration on a legal claim in favour of one party against another party, based on an accurate knowledge of the state of affairs, and is made before a judge in a prescribed form. The taking and giving of testimony is Fard ala al Kifaya or collective obligation. It becomes Fard al Ain or individual obligation if only one person is present on the scene.[36]

Crimes are divided into two categories, Haqq Allah or crimes involving public rights and Haqq Adami or crimes involving private rights. Hadd punishments come under the category of public rights. Public right is given preference to private

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[34] Khadduri, 1984, pp. 148-9; for details see, *Tuhfat al Hukkam* of Shaykh 'Asim al-Andalusi, Gift for the Judges translated into English by Bello Muhammad Daura, Zaria, 1989, pp. 9-14 and 16-7

[35] Baroody, George M. 'Shari'ah Law of Islam' in *Aramco Journal*, 1962, pp. 27-36 at p. 31

[36] *The Encyclopaedia of Islam*, edited by M. Th. Houtsma, A. J. Wensinck, H.A.R. Gibb, W. Heffening and E. Levi Provencal, Leyden and London, 1934, Vol. IV, p. 261

rights.[37] In cases involving corporal punishment of Haqq Allah it is recommended that witnesses remain silent.[38]

Khadduri propounds that the experience of Islam in procedural justice demonstrates that man in earlier societies was more habitually inclined to trust the judge who enjoys a good reputation than the judicial system. Although the structure of the Court was primordial, the qualities of the judge were defined with particular care. The judge was the central figure in the judicial process. The judge is Qadi 'adl or just judge and likewise the witness is Shahid 'adl or just witness, because 'adl (justice) is second only to faith as the highest quality a man should possess, were he to be chosen a judge or a witness. Like the judge, the witness or Shahid, whose testimony is considered the objective evidence, Al-bayyina, on the strength of which the judge makes decision, must be a person of good character, i.e. Shahid 'adl. The minimum requirement is that he must display justness at the time when his testimony is provided. It seems that the early jurists were more concerned with the truthfulness of the judge and the witnesses, assuming that moral and truthful persons would speak the truth.

Later jurists laid down further requirements and specified conditions for witness testimony. Ibn Rushd (520 H./1126 A.D.-595 H./1198 A.D.), a Maliki judge, stated that the witness must be a free and adult believer, and above all he must be just according to the Qur'anic Sura 65:2. Some jurists agreed that a sinful person, i.e. a Fasiq should not qualify even if he repented, although most

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[37]Shaheed, Abdul Qader 'Oudad, *Criminal Law of Islam*, Karachi, 1987, Vol. I, pp. 110-1

[38]*The Encyclopaedia of Islam*, 1934, Vol. IV, p. 261

jurists were inclined to accept testimony if the witness had repented.[39] In the words of the Second Khalifa Umar ibn al Khattab, all Muslims are credible witnesses except those who have suffered stripes for offences with fixed penalties, i.e. Hudud offences, such as having been proven to have given false testimony, or being suspected of partiality on the ground of relationship, whether of blood or of patronage.[40]

The institution of witness testimony took a formal form of *Shahada* in 174 H./790 A.D. This institution is different from the above-mentioned witness testimony of lay person and Muzakki. This institution consisted of a procedure in which the judge ascertained the reliability of an individual and recognised him as a truthful witness whose testimony could not, in principle, be doubted. The parties could at the same time call their own witnesses but the testimony of these witnesses was at risk of being discarded. The system of Shahada originally was developed to protect the validity of the legal acts of transactions, judgements, etc. Later the institution became a necessary part of the judicial system. Its primary function was to provide witnesses to the hearings and the judgement in the suit. This institution is firmly established in the Hanafi, Maliki, and the Shafei school of thought.

There was no precise regulation as to the number of witnesses a judge could hear. It seemed to depend on the consideration of practical expediency and the opinion of the judge. It appears that

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[39]Khadduri, 1984, pp. 145-8

[40]Fyzee, *A modern approach to Islam*, Delhi, 1981, p. 43

a minimum of two witnesses was required, but in practice four witnesses used to remain present.[41]

1.4 Law of Evidence in Pakistan and Bangladesh

It appears that the materials on the law of evidence in Pakistan and Bangladesh are available in the form of statutes and case law for the procedure in the Court, and the authors personal knowledge for procedure outside the Court which is acquired by practising as a lawyer in chamber for a year. The clients related their experiences in informal conversations. The observations made in this thesis from personal experiences regarding different aspects of winess testimony could form the basis of field work for further work of this kind. There are multitudes of cases but few clearly enunciated principles.[42] The principal cause for this state of affairs is perhaps the failure to give adequate attention to the basic concepts which are required for the satisfactory elaboration and exposition of the rules of evidence.

Pakistan at present follows Qanun-e-Shahadat, 1984, as the general law of evidence, as mentioned in the introduction. Some other provisions of the law of evidence are contained in the special law of Hudud Ordinance of 1979 in Pakistan.[43] Bangladesh adheres to the Evidence Act of 1872 with such amendments from time to time as seemed necessary. Qanun-e-Shahadat is the revised, amended and consolidated form of Evidence Act, 1872. It has brought the law of evidence into conformity with the

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[41] Tyan, Emile, 'Judicial Organisation' in *Law in the Middle East*, edited by Majid Khadduri and Herbert J. Liesbeny, Washington D.C., 1955 re 1984, Vol. I, pp. 236-278 at pp. 253-254.

[42] Montrose, J. L. 'Basic Concepts of .....' 1992 at p. 347

[43] see chapter 2.3.2 for the rules of law of evidence introduced by the Hudud Ordinance.

injunctions of Islam as laid in the Qur'an and the Prophetic Traditions. Almost all the provisions of the Evidence Act, 1872, have been kept intact with a few amendments because it has been said that most of the provisions of the Evidence Act were not repugnant to Islamic principles of law, and that very few amendments were required to bring it into conformity with the tenets of Islam. Some of the amendments in the Evidence Act are of formal nature only and do not seem to have changed any rule of law at all.

Evidence as defined in article 2(c) of the Qanun-e-Shahadat and section 3 of the Evidence Act is a) oral evidence of witnesses relevant to the matters of fact under enquiry which the Court permits or requires to be made before it, and b) documentary evidence produced for the inspection of the Court.

The definition of oral and documentary evidence would include hearsay and circumstantial evidence that could be proven orally or by document. Documentary evidence includes all primary and secondary form of evidence.[44] Although the definition of evidence does not include exhibited objects, often the instrument through which crime is committed or things recovered during inquiry are exhibited in the Courts according to article 71 of the Qanun-e-Shahadat and section 60 of the Evidence Act. Assumptions, however logical, cannot take the place of evidence.[45]

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[44]also see arts. 70, 71 and 72 of the Qanun-e-Shahadat, 1984 and ss. 59, 60 and 61 of the Evidence Act, 1872

[45]Muhammad Sarwar v. Federal Government of Pakistan 1988 P Cr. L J 213 at p. 235 [Lahore]

Hudud Ordinance for Hadd[46] offence allowed a Court to convict on the testimony of a certain number of eye witnesses or on the accused's confession. The Court, however, can estimate the probative value of any other kind of evidence, instead of restricting itself to eye witness testimony or confession, for determining Tazir punishment for offences failing to reach the stage of Hadd offence.

Qanun-e-Shahadat and the Evidence Act do not define witness testimony. The ability of a witness to testify can be construed from various articles of the Qanun-e-Shahadat and sections of the Evidence Act. Article 2 on fact, and article 71 and article 3 on who may testify of Qanun-e-Shahadat and section 3 on fact, and section 60 and section 118 on who may testify of the Evidence Act read together would mean that a witness is a person who is conscious to perceive facts which s/he is able to depose. The procedure to testify a fact is laid down in chapter X of both the Qanun-e-Shahadat and the Evidence Act on the examination of witnesses.

The case law is still in the transitional period of development. The case law pending before the promulgation of Qanun-e-Shahadat is guided by the Evidence Act. There would seem to be an amalgamation of the two codified laws prevalent in the case law. As when a law is altered, during a pendency of an action, the rights of the parties are to be decided according to the law as it existed when the action was taken, unless the new Act or amendment expressly shows clear intention to vary such rights,

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[46]see chapter 2.3.2

with retrospective effects.[47] Since the Qanun-e-Shahadat was not intended to have retrospective effect, the procedure already prevalent in the pending cases continued and could not be terminated.

1.4.1 Practice of the Law of Evidence in Pakistan and Bangladesh

The general trend in Pakistan and Bangladesh is to follow the best evidence, qualifying the same with exclusionary rules. The exclusionary rules are that direct oral evidence excludes hearsay evidence, documentary evidence excludes oral evidence and primary evidence excludes secondary evidence. These exclusionary rules are not contradictory to the Islamic law. In traditional Islamic law oral evidence is preferred. This is due to the fact that Islamic law developed at a time when documents were in rare use. The Qur'an, the primary source of Islamic law always preferred documentary evidence.[48] It seems from the case law that a system is evolving which is taking an intermediate course between traditional air tight rules and the proposed theory of free proof of Jeremy Bentham. It may be mentioned that there does not seem to be any debate in issue on the free proof theory either of Jeremy Bentham or of Jonathan L. Cohen in these two countries. Free proof means an absence of formal

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[47] Ali Gul and 3 others v. The State 1980 P Cr. L J. 1190 at p. 1195 [Karachi], this observation is made in terms of section 288 of the Code of Criminal Procedure, 1898. But as a rule it is applicable to all amendments and existing laws in force.

[48] see chapters 1.3 and 2.1.1.4

rules that interfere with free enquiry and natural or common-sense reasoning.[49]

The Courts may or may not follow the rules excluding parties and others as witnesses on grounds of interest or unreliability. Though the term veracity still appears in the statutes, the Courts are more concerned with the truthfulness of the statement. Each case is assessed on its own merits on the probative value of the evidence. The probative value of evidence is weighed in the Courts of Pakistan and Bangladesh, it seems, by ordinary probability. It is presumed that the rules of evidence apply uniformly throughout Pakistan and Bangladesh as it appears in the statute and case law. This presumption is to a certain extent true as far as Courts of law are concerned, but the picture is different in the villages. The huge mass of the village people in daily life resolve cases by shalish[50] or arbitration in panchayats[51] or village councils. Here perhaps Jonathan L. Cohen's free proof theory is in application in its peak. It seems that most of the village people are unaware of the intricacies of rules of evidence in the legal world. Though village people institute murder cases, land disputes, etc. in a Court, there are instances where murder on land dispute is settled by paying compensation to the aggrieved party. This could be compared to

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[49]Twining, William, *Rethinking evidence, Exploratory essays*, Oxford, 1990, p. 194

[50]Adnan, Shapan, *Annotation of Village Studies in Bangladesh and West Bengal: A Review of Socio Economic Trends over 1942-88*, Dhaka, 1990, pp. 175-8; People in Pakistan also resort to arbitration at village level.

[51]The literal meaning of the Sanskrit word panchayat is coming together of five persons. Council, meeting, court consisting of five or more members of a village or caste assembled to judge disputes or determine group policy is included in the meaning of panchayat; defined in the Glossary of the *Law and Society Review* 1968-1969, Vol. III, No. 2, pp. 463-468 at p. 466.

the Islamic law of Diyat.[52] There are also examples where many matrimonial disputes, adultery, etc. are decided on the testimony of one man or confession of the couple concerned. The disputes are settled orally without following any intrinsic rules of evidence. Even hearsay or circumstantial evidence is a good ground to punish the one charged of any offence. Penalty never takes the form of capital punishment. Mostly beating and insulting are the maximum punishment. Only in cases similar to ordeal, a Muslim is asked to take oath on the Qur'an or in the mosque and if Hindu in a temple. Then this person or any member of his/her family is cursed with death or accident beforehand if s/he is lying. These rules seem to have developed from the customary practices. Usually an influential person, (usually a self appointed person) presides over such village councils. Personal bias of influential persons can often lead to injustice.

The local level system is not destroyed because of the national level system, rather disputants have multiple options for pursuing grievances.

1.5 Conclusion

Broadly the definition of evidence in the Courts of Pakistan and Bangladesh does not differ from that expressed in the English text books. The rules of evidence in the urban areas of Pakistan and Bangladesh are governed by the Qanun-e-Shahadat and the Evidence Act. The rules are documentary evidence excludes oral evidence, direct evidence excludes hearsay evidence and primary

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[52] Diyat is discussed in chapter 2.3.2

evidence excludes secondary evidence. It has already been pointed out that Qanun-e-Shahadat is an amended version of the Evidence Act. Therefore the Courts mostly follow the general principles of evidence enumerated in the statute in evaluating a disputed fact although the judges are left with much discretion even among those defined principles. Moreover, Qanun-e-Shahadat of Pakistan is flexible enough to accommodate the rules of evidence practised in the Indian sub continent for centuries.

It appears that in the rural areas the intrinsic rules of evidence are little known although cases are filed in the Courts. A huge number of cases are settled outside the Court by arbitration. Once the cases from rural areas are filed in the Courts the rules of evidence are applied.

Witness testimony or Shahada is the best proof in traditional Islamic law for both civil and criminal matters. General proof is also accepted. The Qur'anic injunction documentary evidence is avoided by interpreting it as a recommendation. Since high standard of integrity is required from witnesses in Islamic law to implement capital punishment, Hudud punishments are difficult to implement. In most cases the Courts pronounce the judgement on general proof within the category of Tazir. Thus, the general principles of evidence do not contradict the Islamic norms and practices and therefore Pakistan and Bangladesh both broadly adhere to the Islamic regulations.

CHAPTER 2

2. Development of the Law of Evidence in the Indian Subcontinent

In this chapter the Islamic law of evidence in Muslim and British India, the introduction of the Evidence Act,1872 in the subcontinent and the reintroduction of Islamic law in Pakistan are discussed briefly. This chapter is meant as a link to the other chapters following it. Since a detailed analytical study of all the topics would lead to a thesis in itself, most of the topics are dealt with concisely. Islamic law of evidence in India is summarised as it appears in the Indian text books. The confusion among the writers as to the applicable law during British India is discussed. A brief picture of recent developments and the legal changes in the area of evidence is also drawn.

The law of evidence as understood in the Indian subcontinent was basically the Evidence Act of 1872. India and Bangladesh have amended the Act as suitable to their own needs, until the present in the case of Bangladesh, and until 1984 in the case of Pakistan when she claimed to have replaced it. Qanun-e-Shahadat is the law of evidence in Pakistan at present. The Evidence Act is popularly known as a British legacy from the colonial period.[1]

The present day English law of evidence is the creation of nineteenth century.[2] Before the 17th century religion was the

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[1] Woodroffe, Sir John, *Woodroffe and Ameer Ali's Law of Evidence*, 8th ed., Calcutta and Simla, 1925, p. 7; Sarkar, Prabhas C., and Sudipto Sarkar, *Sarkar's Law of Evidence*, 12th ed., Calcutta, 1971, p. 15; Acharya, Bijoy Kisor, *Codification in British India*, Calcutta, 1914, p. 292

[2] Nokes,G D., *An introduction to Evidence*, 3rd ed., London, 1962, p. 18; Cross, Rupert, *Cross on Evidence*, 6th ed., London, 1985, p. 1; Heydon, J.D., *Heydon: Evidence cases and Materials*, 3rd ed., London, 1991, p. 3

guiding factor of evidence in an English Court,[3] whereas India had a rich heritage of religion, law and culture for centuries.[4] What law used to be followed in this country before the arrival of the British is of much interest.

Power lay with the Muslim rulers before the British took over power in administrative, political and legal terms'.[5] So were administration, judiciary and legislative matters though it is accepted by many that customary laws applicable to different religious groups were left undisturbed.[6]

Officially the law applicable to the subcontinent for all purposes whether civil, criminal or family matters was Islamic law.[7] Today it is difficult to visualise what exactly Islamic law and the Islamic administration of justice were like, partly due to the unsystematic preservation of the documents [8] and partly due to the language used in the Courts.[9] Arabic and Persian were mainly used for official records and administrative works.[10] Though most of the records on

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[3]Nokes, 1962, p. 18

[4]Mann, T K., *Administration of Justice in India*, New Delhi, 1979, p. 9

[5]Jain, Dr. B.S., *Administration of Justice in seventeenth century India*, 1st ed., Delhi, 1970, p. 31; Husain, Wahed, *Administration of Justice during the Muslim Rule in India*, 1st. ed., Delhi, 1934, re. 1977, p. 17

[6]Jain, 1970, p. 41; Hai, Maulana Hakim Syed Abdul, *India During Muslim Rule*, 1st. ed. Lucknow, 1977, p. 84; Husain, pp. 83-5, 1977; Rahim, Abdur, *Muhammadan Jurisprudence*, London, 1911, p. 37

[7]Hai, 1977, p. 77; Jain, 1970, p.31; G. P. Singh contends that except for public or criminal law, Muslim law was applicable to all subjects. It does not seem true in presence of the authority that Hindus were left to their own laws. G. P. Singh, *Conflict of Personal Laws in India*, University of Allahabad, Ph. D. Thesis 1950, pp. 13-14

[8]Ahmad, Muhammad Basheer, *Administration of Justice in Medieval India*, Karachi, 1951, p. 35

[9]Hai, 1977, pp. 13-5; Tahir Mahmood argues that it is due to the authors of legal history and history ignoring the pre British period in his book *Personal Laws in Crisis*, New Delhi, 1986, p. 107

[10]Hai, 1977, pp. 13-15

family matters had been translated into English it was not followed in other areas.

The other large numbers of inhabitants were Hindus. They were left to their own sets of rules to follow.[11] Hindu law was in all probability administered by the village panchayats, which retained their judicial jurisdiction. An appeal from their decision would go to the provincial governors, and from there to the Emperor, the final Court of appeal for all persons and communities.[12] The Hindu law of evidence had the similar basic rules of oath, administration of oath, direct evidence, etc. and generally did not allow a woman, child, old man, pupil, relative, slave or servant to give evidence except in urgent criminal suits.[13] As it is not within the scope of this thesis to discuss Hindu law of evidence this point is not elaborated any further.[14]

In Islam most of the jurists adhere to the view that women are not competent witnesses for grave offences and many matters and even if they are, a man's testimony is equal to two women.[15] This view is being reinterpreted lately, with that women are capable of giving testimony all cases except grave offences and fixed loan transactions.[16]

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[11] Jain, 1970, p. 38; Aleem, A.K. M. Abdul Bharote *Muslim Shashon Babosthar Itihash meaning History of Muslim Administration in India*, Dhaka 1976 pp. 111 and 208; Fyzee, Asaf A. A. 'Development of Islamic Law in India : A Bird's Eye View' in *Socio Cultural Impact of Islam in India*, edited Athat Singh, 1st ed., Chandigarh and Delhi, 1976, pp. 107-115 at p. 112

[12] Ahmad, Muhammad Aziz, *Political History and Institutions of the Early Turkish Empire of Delhi*, Lahore, 1949

[13] Thakur, Amareswar, *Hindu Law of Evidence*, Calcutta,1933, pp. 53-96; Shraddhakar, Supakar, *The Law of Evidence in Ancient India*, Calcutta, 1990, pp. 49-51

[14] see for details on Hindu Law Thakur, 1933 and Shraddhakar, 1990

[15] Ahmad, M.B. 1951, p. 214; Jain, 1970, p. 19 see for other views chapter 6

[16] *Report of the Pakistan Commission on the status of Women*, Islamabad, 1988, p. 146 and chapter 6

Regarding the truthfulness of a witness, Islamic law seems more rigid than other existing laws. This is probably due to the non application of the law for a long time. Because it has been seen that Islamic law in theory varies from the Islamic law applied in Court like many modern laws, keeping the essence intact just as the laws embodied in a Code or an Act varies with different time and places bringing a different judgement from the previous one. This will be clear from the following discussion on Islamic law of evidence in India and in the following chapter dealing with probity of a witness.

2.1 The Islamic Law of Evidence before the British rule

The Islamic law of evidence is largely based on the juristic theory of the Muslim learned scholars. The Muslim rulers of India were mostly Sunnis following the Hanafi School of thought and this school became dominant as the general law of the land.[17] The Hidaya and Fatawa-i-Alamgiri remained the foremost works applicable as law during the Muslim rulers of India.[18] The Hidaya was compiled by Burhanuddin al-Marghinani (d. 1196 A.D.[19] or 1203 A.D.[20]) according to the doctrines of Abu Hanifa and his disciples Abu Yusuf and Imam Muhammad, and was the standard legal text book in Muslim India under the Delhi Sultans. It is said about Hidaya that it

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[17]Fyzee, Asaf A. A., p. 77 'An introduction to the study of Mahomedan Law' in The *Muslim Law Journal*, 1931-1932, Vol. 1, pp. 45-84 at p. 77; Latifi, Danial, ' Change and the Muslim Law' in Seminar on *Islamic Personal Law in Modern India* under the auspices of the Indian Institute, New Delhi, January 14-17, 1972, pp. 1-26 at p. 7

[18]Latifi,' Change and .....' 1972 at p. 7; Anderson, J.N.D. 'Islamic Law and its Administration in Indian contributions to the Study of Indian Law and Society' in *South Asia Seminar*, University of Pennsylvania, Philadelphia, 1966-67, pp. 105-136 at p. 109

[19]Morley, W.H., *The Administration of Justice in British India*, London, 1858, p. 288

[20]Latifi, 'Change and the ....' 1972 at p. 7

superseded all previous books on the law.[21] This great legal text book remained the basis of Muslim law for centuries and was finally translated into English by Charles Hamilton as the Hedaya, under the recommendation of Warren Hastings who was the governor of Bengal from 1772-74 A.D.[22] It has been claimed that Hamilton's translation is incorrect and misleading.[23] For this reason, whenever there was some doubt, the citations made in the thesis from Hedaya is checked against the original Arabic or other sources. The Fatawa-i-Alamgiri is a comprehensive digest of the jurists' opinion compiled by a commission of jurists under the aegis of Emperor Aurangzeb at the end of the 17th century.[24] No other Fatawa is equal to its excellence. It is termed as Fatawa-i-Hind or Indian expositions in Arabia.[25] Due to its comprehensive nature it is applicable in almost every case that arises involving points of Hanafi law.[26] Parts of the Fatawa-i-Alamgiri were translated into English in 1875 A.D. by Neil Baillie and published as Baillie's Digest of Moohomedan Law Vol. I.[27] Unlike Hidaya, which contains both a statement and discussion of legal principles, the Fatawa-i-Alamgiri contains only a compilation of laws. There are also some text books that contain the basic rules of Hanafi law of evidence applicable to Muslims in India. The book of the Indian writer Muhammad Basheer Ahmad is the only available work that contains a detailed discussion of the application of the law

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[21] Morley, 1858, p. 289

[22] Rashid, Syed Khalid, *Muslim Law*, Lucknow, 1985, p. 34; Latifi, p. 7; Morley, 1858, p. 289

[23] Hussain, Abul, *Muslim Law as Administered in British India*, Calcutta, 1935, pp. 50-1

[24] Fyzee, 1981, p. 63

[25] Harington, John Herbert, *An Elementary Analysis of the Bengal Laws*, Part 1.2, Vol. 1, Calcutta, 1805-1809, p. 244

[26] Morley, 1858, p. 313

[27] Latifi, 'Change and the ....' 1972, at p. 7

of the evidence in a few cases. He relied for his work on materials available in English and in Persian. He cites cases from his collection of fifty judgements and orders from various persons delivered during the period 1550-1850 A.D. He has named this collection as Baqiatus Salehat and is not publicly available. Another source that he refers to is Collections from Waqae Nigars, discovered in Hyderabad Deccan. Centuries of administrative experience in India and elsewhere developed a law of procedure that was followed by the Qazi's Court and also by the Sultans and the Badshahs when they decided cases in India.[28] Though Muslim jurisprudence allows direct evidence of witness testimony and confession, courts would undertake further investigation to prove suits by other kinds of evidence.[29] According to an Indian writer, B. Jain, evidence during the Mughal period was of various types: statements of witnesses, oaths and written documents.[30] This should be true of the Sultanate period as well because these kinds of evidence were known even in early Islamic period.[31]

2.1.1 Kinds of Evidence

According to juristic Hanafi law there are three kinds of witness testimony. Tawatur meaning universal testimony is the best form of evidence. In this kind of evidence a large body of men accurately depose to the same facts. It could also mean evidence of facts having

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[28] Sharma, Sri Ram, *Mughal Government and Administration*, 2nd ed., Bombay, 1965, pp. 211-3; Aleem, 1976 pp. 104-116; for more information and different opinion see Ishtiaq Husain Qureshi, *The Administration of the Mughal Empire*, New Delhi and Patna, NY, pp. 180-206; Jagadish Narayan Sarkar, *Mughal Polity*, Delhi, 1984, pp. 171-219

[29] Sharma, 1965, pp. 212 and 224-230.

[30] Jain, 1970, p. 42

[31] see chapter 1.3

public notoriety.[32] Ahad is the testimony of a single individual and Iqrar is an admission including confession. The Muslim jurists have unanimously preferred Tawatur to any other kind of evidence.[33]

It seems that the first two kinds of witness testimony must have developed from the science of collecting Prophetic Hadith (Traditions). Hadith Ahad and Hadith Mutawatir are two kinds of Hadith based on the number of relaters. Hadith Ahad at best could have up to four persons relating a Hadith whereas Hadith Mutawatir would have numerous number of persons relating a Hadith.[34] Therefore these kinds of witness testimony would be juristic development based on the collection of Hadith, which did not systematically start before the death of the Prophet.[35] Iqrar was known in the Prophet's time, as is clear from the Hadith collection.[36] Evidence could be direct or indirect. Though direct evidence is understood to be the main form of evidence in Islamic law by all the schools of thought[37] indirect evidence is also recognised by the jurists. Indirect evidence was often used in Muslim India as will be seen from the following discussion and cases cited by Basheer Ahmed. The direct testimony requires the presence of an eye-

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[32]Hallaq, Wael B., 'On Inductive Corroboration Probability and Certainty in Sunni Legal thought' in *Islamic Law and Jurisprudence* edited by Nicholas Heer, Seattle, 1990, pp. 3-31 at p. 17

[33]Ahmad, M.B. 1951, p. 212; Husain, 1977, p. 121; Mahomedullah, Al Haj Ibn S. Jung, *The Administration of Justice of Muslim Law*, 1926, p. 87; Rahim, 1911, p. 376

[34]Siddiqi, Dr. Muhammad Zubayr, *Hadith Literature*, Calcutta, 1961, pp. 193-4

[35]Siddiqi, Dr. M.Z., 1961, pp. 7-8

[36]see e. g. Bukhari, Muhammad ibn Ismail, *Sahih al Bukhari*, translated by Muhammad Muhsin Khan, Lahore,1979, Vol. VIII, Hadith No. 805-6, pp. 527-8

[37]Salama, Dr. Ma'moun M. 'General Principles .....' 1982 at p. 118

witness.[38] Indirect evidence could be hearsay or circumstantial evidence.

2.1.1.1 Direct Evidence

The direct testimony requires the presence of an eye-witness.[39] An example is the application of Hadd punishment by Sultan Firoz Shah Tughluq (ascended the throne in 1351A.D.) who is said to have revived the real spirit of Sharia.[40] The Sultan condemned a person to Hadd punishment of execution after the charge was proved by witness testimony and confession of the person when he was declared apostate by the Ulema (learned scholars) for his heretic claim of Prophethood.[41]

2.1.1.2 Hearsay Evidence

Hearsay evidence was admitted somewhat freely in cases before the Faujdar (a Court having military and police duties and associated with revenue administration)[42] where the accused persons' previous records and their likelihood to disturb the peace was in question. The Court could take judicial notice of facts too well known to require proof.[43] A fact that had public notoriety regarding the state of a certain thing, its existence, its use, etc. was admissible, e.g.

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[38] Ahmad, M.B. 1951, p. 214; Husain, 1977, p. 119; Mahomedullah, 1926, p.88, Jain, 1970, p. 17; Rahim, 1911, p. 378

[39] Ahmad, M. B. 1951, p. 214 ; Husain, 1977, p. 119; Mahomedullah, 1926, p. 88, Jain, 1970, p. 17; Rahim, 1911, p. 378

[40] Rashid, S. Sh. Abdur, and M.A. Makhdoomi, 'Futuhat-i-Firozshahi' in *The Muslim University Journal*, 1943, Vol. I., pp. 93-131 at p. 95; Aleem, 1976 p. 114

[41] Rashid and Makhdoomi, 'Futuhat-i-.....' 1943 at pp. 111-2

[42] for details on Faujdar see Siddiqi, Noman Ahmad, 'The Faujdar and Faujdari under the Mughals' in *Medieval India Quarterly*, 1961, Vol. VI., pp. 22-35

[43] Ahmad, M.B., 1951, p. 215,

the existence of an endowed property (Waqf) and its use, whether a building is a public mosque and so forth.[44]

To come to a conclusion based on hearsay evidence the judge is supposed to consider that :

Facts or occurrences which militate against or appear impossible to rational intelligence (Aql-Qatay'i) are not worthy of reliance,

Facts and occurrences which are contrary to ordinary human experiences or natural course of events are not worthy of credence,

Facts that stand in direct conflict with clear reasoning or rationalisation (Qias-i-Jali) are not accepted.[45]

Examples of hearsay evidence would be birth, death, marriage, legitimacy, paternity, cohabitation, appointment and jurisdiction of a Qadi, etc.[46] provided that the information is received from men of reliable character. Even in those matters, a mere statement by a witness that he heard so and so would not be accepted, but he must declare the fact itself, for instance, that on a particular date so and so was Qadi of such and such a place and he knew it, although his knowledge might be based on hearsay.[47]

2.1.1.3 Circumstantial Evidence

Circumstantial evidence or Qarinah was also admissible, provided it was beyond reasonable doubt or positive, Qatiatun.[48] For instance, if

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[44]Husain. 1977, p. 120; *Hidaya*, by Burhanuddin al Marghinani, translated in English as the *Hedaya* by Charles Hamilton, London, 1791, Vol. IV, p. 469; Baillie, N.B.E., *A Digest of Moohumudan Law*, Part I, 2nd ed., London, 1875, pp. 425-7; Jain, 1970, p. 18

[45]Husain, 1977, p. 120; Jain, 1970, p. 18

[46]*Hedaya*, 1791, Vol. II, p. 677; Macnaghten, Sir William Hay, *Principles of Hindu and Mohammadan Law* edited by H.H. Wilson, Edinburgh, 1862, p. 236

[47]Rahim, 1911, p. 378

[48]Ahmad, M.B., 1951, p. 215; Husain, 1977, p. 123; Ahmad, M.B., 1951, p. 215; Husain, 1977, p. 123; Mahomedullah, 1926, p. 88; Jain, 1970, p. 21; Rahim, 1911, p. 381

a person is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand, and in the house a dead body is found with its throat cut, these facts in theory will be regarded as proof that the person who is seen coming out murdered him.[49] This theory was not applied in State vs. Madari Faqir. In that case the accused was acquitted of the offence of theft as his merely running out of the house at night, when the residents were away, was not considered sufficient to prove his guilt.[50] The year of this case could not be ascertained as the author referred to a source available in his personal library. In another case a Hindu scribe sued a Mughal soldier for enticing away his wife or slave girl. She denied that the complainant was her husband, but Badshah Shahjahan (ascended the throne in 1627 A.D.), not satisfied with the statement, suddenly ordered her to fill the court ink pot with ink. The woman did the work most dextrously and he concluded that she was the wife of the Hindu scribe and granted him a decree and the Mughal soldier was expelled from service.[51] Circumstantial evidence cannot lead to Hadd punishment.[52]

2.1.1.4 Oral and Documentary Evidence

Documentary evidence was also accepted.[53] Official documents, records of a court of justice, duly executed in the presence of two

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[49]Rahim, 1911, pp. 381-2; Husain, 1977, p. 123; Jain, 1970, p. 21

[50]Ahmad, M.B., 1951, p. 215

[51]Ahmad, M.B., 1951, p. 216; Manucci, Nicholas, *Storia do Mogor or Mogul India 1653-1708* translated by William Irvine, London, 1906, Vol. I, p. 203, 1906, Jain, 1970, p. 136,__the later two mentions slave girl. Husain is sceptic about Manucci's many uncorroborated sources, Husain, 1977, preface, pp.xv-xvi.

[52]*Hedaya*, 1791, Vol. II, pp. 55-6

[53]Mahomedullah, 1926, p. 88; B. Jain, 1970, p. 43

witnesses and books kept in the ordinary course of business were accepted in evidence.[54]

It was common practice in Muslim India to prefer oral evidence to documentary evidence. If documents alone were produced the Courts were to insist upon examining the party that produced them.[55] This could either probably be due to the notion that it is easier to forge documents than to lie in a Court or because of the vast illiterate mass of people whose oral version was considered necessary to corroborate the facts of the document.

2.1.1.5 Iqrar : Admission : Confession

Decrees could be given on admission, Iqrar, provided it was unconditional[56] and not made in jest or under coercion.[57] Admission to be admissible, must have been made by a competent person who is free, sane and mature.[58] The juristic theory is when a person makes a statement against his own interest and it supports the claim made against him, such admission or statement will not be binding on others.[59] The importance of admission was great in proving relationship,[60] paternity, dower-mahr, and was in civil cases generally, in India.[61]

In criminal cases a confession was admissible in evidence. In Mian Malik's case during the reign of Sultan Sikandar Ghazi (ascended the

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[54]Husain, 1977, p. 123; Jain, 1970, p. 19; Rahim, 1911, p. 382

[55]Ahmad, M.B., 1951, p. 216

[56]Ahmad, M.B., 1951, p. 216

[57]Husain, 1977, p. 120

[58]*Hedaya*, 1791, Vol. III, pp. 138-9; *Muqaddamat Hidaya* by Burhanuddin al Marghinani, NP, NY, Vol. II, p. 215

[59]Rahim, 1911, p. 381; Husain, 1977, p. 121

[60]Baillie, 1875, p. 407

[61]Ahmad, M.B., 1951, p. 217

throne on 7th Shaban 894 A.H.),[62] the accused made a confession and it was relied on.[63] However, a confession made under threat or inducement was inadmissible [64] Badshah Aurangzeb (ascended the throne in 1658 A.D.) in remanding a complaint case said:

'The Qazi and the Amin should make thorough enquiries and not decide the case on a mere admission or denial' [65]

The ruling apparently applies both to civil and criminal cases. This rule presumably was laid down judicially at some time. If an accused confessed his guilt and then retracted and the case was proved, the sentence was to be less severe.[66] The law made a distinction between first offenders and habituals. Sometimes the accused was given an opportunity of confessing his crime and expressing repentance for it, and if he did so he was then treated leniently.[67] A statement made in a criminal case was admitted in a civil suit against the person who made it.[68] A woman's confession of Zina[69] with a mad man or with a boy would not subject her to the stated punishment of Hadd.[70] A confession in a fit of intoxication was invalid.[71]

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[62]Elliot,Sir Henry, *The History of India as told by its own Historians*, London, 1872, Vol. IV, p. 444; Most probably the case was during the reign of Sultan Sikander Lodi who ascended the throne on 1489 A.D. as the Hijra date corresponds to the Christian date.

[63]Elliot, 1872, Vol. IV, p. 454; Ahmad, M.B., 1951, p. 217

[64]Ahmad, M.B., 1951, p. 217 referring to MS. Add. 22714f. 33

[65]Ahmad, M.B., 1951, p. 218 referring to MS. Raqaem e Keram K.C.C.,MS. Add.26,239 Br.Mus.f.16

[66]*Kitabul Ikhtyar* translated into Urdu as *Islami Foujdari Qanun* by Maulana Salamat Ali Khan, Lahore, NY, p. 61; Ahmad, M.B. 1951, p. 217

[67]Sharma, 1965, p. 223

[68]Manucci, 1906, Vol. I, p. 200

[69]see chapter 2.3

[70]*Hedaya*, 1791, Vol. II, pp. 30-1

[71]*Hedaya*, 1791,Vol. II, pp. 55-6

2.1.2 Competency of Witnesses[72]

According to juristic theory it is incumbent on a claimant to bring evidence in his support. According to the law all those who believe in God and respect the Book of revelation, i.e. the Qur'an, can be competent witnesses --- Adala.[73] A Qadi, the judge is in theory, was expected to keep himself informed about truthful persons within his jurisdiction.[74] It was incumbent upon the law to take the precaution to prevent the Court from being misled by falsehood. The believers could not be rejected as untruthful unless proved to be so.[75] A person could be considered incompetent to depose as a witness if s/he was an atrocious criminal, immodest person, a usurper, drunkard, falconer, public mourner, professional singer, gambler, habitual liar, convicted person, etc.[76] Those previously discredited as a witness were assumed to be unreliable. In all temporal concerns the word of a reprobate, Fasiq, could be taken. The reason is if anything more than maturity of age and sanity of intellect were required it would occasion a restriction in business. A person whose character was unknown was considered in the same light as an unjust man or reprobate.[77] It would follow that the testimony of a Fasiq would be admissible in matters resulting in Tazir[78] offences and not Hadd offences, as Tazkiya al Shuhud[79] is not a prerequisite in former case. A Fasiq and people who suffered for Qazf[80] were

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[72] *Hedaya*, 1791, Vol. II, pp. 353-7

[73] Ziadeh, Farhat J., 'Integrity in Classical Islamic Law' in *Islamic Law and Jurisprudence* edited by Nicholas Heer, Seattle, 1990, pp. 75-79

[74] Ziadeh, ' Integrity in .....' 1990 at p. 81

[75] Ahmad, M.B., 1951, p. 213;

[76] *Hedaya*, 1791, Vol. II, pp. 687-9; Ahmad, M.B., 1951, p.213; Husain, 1977, p. 122; Mahomedullah, 1926, p. 87; B. Jain, 1970, p. 19; Rahim, 1911, pp. 376-7

[77] *Hedaya*, 1791, Vol. IV, pp. 88-9

[78] see chapter 2.3

[79] see chapter 3.1

[80] see chapter 2.3

competent witnesses to marriage.[81] In theory, in a Muslim Court evidence of a Muslim could be preferred to a non-Muslim who 'does not respect the Books of revelation'.[82] The testimony of a non-Muslim was not altogether to be rejected. In Islam Khan (794 A.H./1329 A.D.), a treason case, the solitary statement of a non-Muslim named Jagu or Jagan was accepted as sufficient for the conviction of a Muslim accused.[83]

In Sultana Razia's murder case (1240 A.D.) the peasant who killed Sultana Razia confessed before the magistrate on suspicion of the dealers to whom he went to sell her valuables. On his confession the victim's body was found.[84]

Men of immature understanding were regarded as unfit for giving testimony, such as infants, idiots, lunatics, or blind persons in matters of ocular testimony, etc.[85]

Two women together could be competent witnesses to corroborate a fact for which the testimony of one man was sufficient.[86] In cases where women possessed special knowledge, the testimony of one woman was relevant, e.g. proof as to virginity or child birth.[87]

The father, grandfather, son and wife and vice versa were not competent witnesses in favour of a man and vice versa,[88] but in cases where relationship was to be proved their statements were

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[81] *Hedaya*, 1791, Vol. I, pp. 74-5

[82] Ahmad, M.B. 1951, p. 213

[83] Elliot, Vol. IV, 1872, pp. 26-7; Ahmad, M.B., 1951, p. 213

[84] Elliot, Vol. III, 1871, p. 593

[85] Husain, 1977, p. 122; Jain, 1970, p. 19

[86] Jain, 1970, p. 19; Ahmad, M.B., 1951, p. 214

[87] Rahim, 1911, p. 377; Ahmad, M.B., 1951, p. 214; Husain, 1977, 121; Jain, 1970, p. 19

[88] *Hedaya*, 1791, Vol. II, p. 360; Ahmad, M.B., 1951, p. 214; Husain, 1977, p. 122; Mahomedullah, 1926, p. 87; Jain, 1970, p. 20; Macnaghten, 1862, p. 236

accepted.[89] A master in favour of his slave, or a partner in favour of another partner in matters relating to partnership property were inadmissible.[90] The evidence of husband and wife in favour of each other was not admissible.

Opinions of experts[91] and the persons especially versed in some particular branch of science, Mahirin-e-Fan such as physiognomy were admissible in evidence[92]. Recourse must be had to skilful persons if the cause of the suit is doubtful.[93]

Testimony was required to be given in the earliest possible time. Distance of time, Takadim, affects the value of the testimony. It is understood that with passage of time sinister motives might influence a man.[94]

2.1.2.1 Number of Witnesses

On an average two 'Adil' or truthful witnesses are necessary to support a suit. The matter seems to have been discretionary with the Courts, and the Qur'an has not prescribed any limit as such.[95] Four male witnesses are required in cases of Zina.[96] The testimony of one upright person that tends to injure the property of another loses its probative value.[97] The Court may in its discretion accept the evidence of one witness provided it is convincing and

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[89] Baillie, 1875, p. 407; Ahmad, M.B., 1951, p. 214, citing Breach of Promise case of Shahjahan's Court, p.21 Rahbar e Daccan, 1341F

[90] *Hedaya*, 1791, Vol. II, pp. 685-6; Husain, 1977, p. 122; Mahomedullah, 1926, p. 87; Jain, 1970, p. 20

[91] Ahmad, M.B., 1951, p. 214

[92] Husain, 1977, p.120; Jain, 1970, p. 18

[93] *Hedaya*, 1791, Vol. III, p. 116

[94] *Hedaya*, 1791, Vol. II, p. 37

[95] Ahmad, M.B., 1951, p. 221

[96] *Muqadammat Hidaya*. NY, Vol. II, p. 138; *Hedaya*, 1791, p. 353; Ahmad, M.B., 1951, p. 220

[97] *Hedaya*, 1791, Vol. IV, p. 90

unreproachable.[98] In a case of attempt to murder the evidence of one witness alone was accepted as sufficient during the reign of Sultan Hussain Shah Chuk (ascended the throne in 1563 A.D.) of Kashmeer,[99] while earlier in Sidi Maula's [100] case, during the reign of Sultan Jalauddin Khalji (ascended the throne in 1290 A.D.) of India it was rejected.[101]

The testimony of women witnesses was not admissible in all cases of punishment and retaliation.[102] In all other cases, for instance marriage, divorce, agency, and concerning property, the evidence required was that of two men, or of one man and two women.[103]

In certain cases that do not admit of the inspection of men the evidence of one woman was deemed sufficient, e.g. proof as to virginity and child birth.[104] However Muslim jurists insist on corroboration of evidence. The general rule is that there should be more than one witness.[105]

2.1.2.2 Method of Recording Witness Testimony

Although it does not appear from the Hidaya that the adversary system of examination in chief and cross examination was in vogue in Islamic law the Indian text books claim that such was the practice in Muslim India. This could be a valid claim since in Saudi Arabia where Islamic law is practised cross examination is seen as a

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[98] Husain, 1977, p. 121

[99] Ahmad, M.B., 1951, p. 213; Briggs, John, *History of the rise of Mahomedan Power*, Vol. IV, London, 1910, p. 517

[100] for details on Sidi Maula see Rashid, 'Jalauddinn Firoz Shah Khilji' in the *Muslim University Journal*, 1931-32, Vol. I, pp. 119-149 at pp. 139-140

[101] Ahmad, M.B., 1951, p. 213 referring to Barani, p. 211 and Badaouni, p. 171

[102] *Muqadammat Hidaya*, NY, Vol. II, p. 138; Mahomedullah, 1926, p. 87

[103] *Muqadammat Hidaya* NY, Vol. II, pp. 138-9; Mahomedullah, 1926, p. 87

[104] *Hedaya*, 1791, Vol. II, p. 42

[105] Husain, 1977, p.121; Jain, 1970, pp. 18-19

safeguard against perjuries.[106] The party producing a witness examined, (Izhar), him first and then the other side could cross examine, (Jirah), him.[107] The fourth Khalifa, 'Ali (he was Khalifa from 35 A.H./656 A.D. to 39 A.H./659 A.D.),[108] first adopted the rule that each witness should be kept separate and then examined and cross examined separately so that 'one may not hear the narration of the other'.[109]

Leading questions were not allowed, to avoid the implication that the Court is trying to help one party to the prejudice of the other by putting questions and getting answers of facts that should be proved by the witness. If a witness was frightened or got confused, the Qadi could put such questions as to remove his confusion, though they may be leading, but not in such a manner as to make him liable to the charge of partiality.[110]

The statements of witnesses were reduced to writing.[111] The depositions were read over to the witnesses by another official, Sahebul Majalis (associate of the Qadi)[112] or by the Qadi[113]. Their name, lineage, address, and Masjid (mosque) were written on the deposition. Then the Qadi used to put his seal on it.[114] If a proper record of proceedings and decrees were not prepared in conformity to the prescribed rules they were declared invalid.[115]

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[106]Baroody, George M, 'Shari'ah Law .....' 1962 at pp. 30-31

[107]Ahmad, M.B., 1951, p. 219; Jain, 1970, p. 21

[108]*The Encyclopaedia of Islam*, New edition, edited by H.A.R. Gibb, J.H. Kramers, E. Levi-Provencal and J. Schacht, Leiden and London, 1960, Vol. I, pp. 381-386

[109]Husain, 1977, p. 122

[110]Husain, 1977, p. 122; Jain, 1970, p.21

[111]Baillie, 1875, p. 763; Jain, 1970, p. 44

[112]Baillie, 1875, p. 766

[113]Ahmad, M.B., 1951, p. 219

[114]Husain, 1977, p. 122

[115]Jain, 1970, p. 13; Baillie, 1875, p. 766

2.1.2.3 Retraction of Evidence

A witness could retract his statement or evidence but such retraction must have been made in Court before the order was passed. If retraction was properly made, his evidence was to be rejected.[116] If not made in Court no notice was to be taken of the retraction.[117] If the retraction was made after the judgement was passed it would not have affected the Court's order unless such evidence caused miscarriage of justice for which the witness would be held liable.[118]

2.1.3 Estoppel

In Islamic law the principle of estoppel is recognised. This is called Bayanud-Darurat.[119] A party could prove conduct by his adversary that precluded him from raising any particular claim or defence.[120] For example, if a person seld an article in the presence of the owner who kept quiet then the owner's subsequent assertion that the person was not authorised to sell will be barred by the rule of estoppel.[121]

2.1.4 Oaths, Summons, Compulsion of Witnesses and Pleaders

Oaths, Saugand, were administered to witnesses. The Muslims said 'by God',[122] or took an oath on the Qur'an,[123] the Hindus on the cow, and

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[116] *Hedaya*, 1791, Vol. II, pp. 717-8
[117] Husain, 1977, p. 121; Jain, 1970, p.18; Rahim, 1911, p. 382
[118] Mahomadullah, 1926, p. 88; Jain, 1970, p. 21; Rahim, 1911, p. 382
[119] Husain, 1977, p. 124; Rahim, 1911, p. 382
[120] Ahmad, M.B., 1951, p. 219
[121] *Hedaya*, 1791, Vol. II, p. 718; Husain, 1977, p. 124; Mahomedullah, 1926, p. 88; Rahim, 1911, p. 382
[122] Ahmad, M.B., 1951, p. 221; Baillie, 1875, p. 748
[123] Jain, 1970, p. 42

the Christians on the Bible.[124] In Nusrat Ali and others vs. Qaim Ali, the plaintiffs refused to take an oath and their suit was dismissed.[125] In another case, Mohiuddin vs. Anbart, the parties were allowed to go to a mosque where the plaintiff was to take the oath. Anbart, the defendant, was a Hindu but he agreed to this procedure.[126] The date of these two cases could not be ascertained as the source used by the author is in his possession only.

Summons used to be issued to the witnesses.[127] If the witnesses refused to give testimony after the fulfilment of all its conditions, he sinned by abandoning a positive duty and deserved to be dismissed for his wickedness.[128] It was incumbent upon a witness to bear testimony. It was not lawful for them to conceal it when the party concerned demanded it from them.[129] The exception to this rule applies in Hudud cases.[130] It seems that in the Abbassid and Ummayyad period witnesses were compelled to appear in person.[131] It seems that the practice in Muslim India also was to send summons to the parties,.[132] and compel the appearance of the defendant.[133] It is possible that it might have been the practice although it would be difficult to assert with certainty. Litigants were allowed to prosecute in person or by their agents, Wakeels. There were some very specialised legal practitioners (Wakeels) in Mughal India, but most Wakeels operated within a wider framework as representatives and

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[124]Ahmad, M.B., 1951, p. 221
[125]Ahmad, M.B., 1951, p. 221 referring to Baqiat, p. 21
[126]Ahmad, M.B., 1951, pp. 221-2 referring to Baqiat, p. 9
[127]Sharma, 1965, pp. 211 and 213; Baillie, 1875, p. 417
[128]Baillie, 1875, p. 417
[129]*Hedaya*, 1791, Vol. II, p. 665
[130]*Hedaya*, 1791, Vol. II, p. 666; Baillie, 1875, p. 421
[131]*The Report of the Law Commission 1967-70*, Karachi, 1970, p. 116
[132]Aleem, 1976, p. 114
[133]*Hedaya*, 1791, Vol. III, p. 65

bargainers for their clients.[134] Women seem to have been very often represented by Wakeels.[135]

2.1.6 Islamic Law in Bengal

Since this thesis looks at the law of evidence in Bangladesh it is worthwhile to see what laws used to be administered in Bengal. Bengal has always kept a distinct status from the rest of India. At times it was administered by the governors appointed by the Sultans or Mughal rulers of Delhi and at times by independent rulers. It can be presumed from the well-organised system that pervaded the Sultanate and the Mughal rule of India that the same system was applicable in Bengal also. Muhammad Mohar Ali, an authority in the History of Bengal, assumes from his intensive research that the Bengal Sultans considered the administration of justice and protection of life and property as the most sacred part of their duties.[136] They administered justice according to the sacred laws of Islam, the Sharia.[137] One example would be when Imamuddin, Kotwal (the magistrate of a town), was in the charge of the port of Hugli (now part of West Bengal), and having acquired a high position and much influence, enticed away the daughter of a Mughal from the latter's house. Ahsanullah Khan, Faujdar (a police magistrate),[138] of the port of Hugli, connived with his Kotwal and stood surety for his future good behaviour. The Mughals carried this complaint to Nawab Jafar Khan, who was granted this authority by Aurangzeb. He is also

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[134] Calkins, Philip B., 'A Note on Lawyers in Muslim India' in *Law and Society Review*, Nov. 1968-Feb.1969, Vol. III, No. 2, pp. 403-406 at p. 406

[135] Sharma, 1965, p. 212

[136] Ali, Mohammad Mohar, *History of the Muslims of Bengal Volume I B Survey of Administration, Society and Culture*, Riyadh, 1985, p. 724

[137] Ali, M.M.1985, p. 725 referring to Firishta II pp. 298-299 and Riyad, pp. 105, 113 and 118.

[138] see above chapter 2.1.1.2

known as Murshid Quli Khan (d. 1138 A.H.)[139] The Nawab, according to the injunctions of the Sharia, had the Kotwal stoned to death.[140] It is difficult from the existing material on Bengal to find out the procedure of proof followed in inflicting punishment. An assumption can be drawn from the above discussion that the procedures used were the same as in rest of the Indian subcontinent. This is a brief picture of the juristic Islamic law and the Islamic law administered during Muslim rule in India.

It may also be noted that Islamic law of evidence was in practice during the early Abbasid Caliphate (750-861 A.D.)[141] down till the end of the Ottoman Empire. The official law of the Turkish Republic was wholly secularised after 1926.[142] The Mejelle of the Ottoman Empire is a proof of that.[143] It can be derived from the practice of the law of evidence in the Islamic empires for centuries that there had developed a well organised systematic rule of evidence out of juristic debate and practices of the Qadi.

2.2 Islamic Law during British Rule

The confusion and arguments for and against the prevailing law in the period between the Muslim rule and the British take-over in India in 1765; the law that was in practice before the Evidence

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[139] Salim, Ghulam Hussain, *Riyazu-s-Salatin (A History of Bengal)* translated in English by Abdus Salam, 1st. published, Delhi, 1903, re. 1975, p. 255

[140] Salim, re. 1975, p. 284

[141] Kasassbeh, Hussein F. S. *The office of Qadi in the Early Abbasid Caliphate 132-247/750-861*, Ph.D. Thesis, London University, 1990 pp. 275-288

[142] Starr, June, *Law as Metaphor from the Islamic Courts to the Palace of Justice*, New York, 1992, p. xxxviii

[143] for details on Ottoman system in classical and during post-tanzimat era when Mejelle was introduced, see Dr. Gulnihal Bozkurt, 'Review of the Ottoman Legal System' in *Osmanli Tarihi Arastirma ve Uygulama Merkezi Dergisi Review Centre for Research studies in Ottoman History*, January 1992, No. 3, pp. 115-128 at pp. 115-117 and 126-127

Act,1872 was passed; and the foundation of the Evidence Act, 1872 are discussed in this sub chapter.

It was stated by a few members of the East India Company that it was impossible to introduce English laws as the general standard of judicial decision in the provinces, without violating the fundamental principle of civil laws that they ought to be suitable both to the genius of the people and to all the circumstances in which they may be placed.[144]

It will be sufficient to observe that the studies and translations of books of law, Hindu and Muslim, made under and above the encouragement of the British government[145] have materially contributed to the ability of the judges of the civil courts to inform themselves on the general points of Muslim and Hindu law and to investigate the expositions of the native law officers attached to their respective courts. This salutary examination and control, it may be expected, became still more efficient under the means afforded by the college of Fort William to study the Shanskrit and Arabic languages, and to obtain a more perfect knowledge of the laws from original authorities.[146]

2.2.1 Presidency Towns

The confusion that beleaguered the minds of the lawyers of that period as to the applicable law of the country was, it seems, due the introduction of English law in 1773 to 1781, the regulations of the three presidencies and the pre-existing Muslim and Hindu law. There were differences of opinion regarding the different statutes

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[144]Harington, 1805-1809, pp. 11, 17, and 24

[145]Morley made an excellent literature review of the Muslim and Hindu law books, Morley, 1858, pp. 199-323

[146]Harington, 1805-1809, p. 77

of English law prior to 1726; whether they were applicable in the Presidency towns to British residents only or the natives also.[147] It is claimed by some of the authors that English law prevailed in the Presidency towns from 1726. Some rules were to be found in subsequent statutes expressly extended to India; while others, again had no greater authority than that of use and customs "*cursus curiae est lex curiae*"[148] (the practise of the Court is the law of the Court). The Charter of 1753 [Charter of 8th June, 1753 granted by King George II] superseded the Charter of 1726 [Charter of 24th September, 1726 in the 13th year of the reign of King George I].[149] It barred the Mayor's Court from entertaining suits or actions between Indian parties unless both parties consent to submit the same for determination by the Mayor's Court.[150] The Mayor's Courts were not Courts of the East India Company but of the King of England and in fact it had no sovereignty in the Presidency towns of Calcutta and Madras; although it had in Bombay. J. N. D. Anderson is of the opinion that the charter of 1753 only represented the existing practice.[151] A uniform system of legislation prevailed only at the close of 1807.[152] An initiative was taken by the British government to introduce English law in India in 1773. The Regulating Act passed

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147 Stokes, Whitley, *A Collection of Statutes Relating to India*, Calcutta, 1867, Preface, pp. i-iv, and Preface to the first edition of the older statutes relating to India, pp.vii-xii.

148 Field, 1894, p. 15; Mann, 1979, pp. 10-2; Fawcett, Sir Charles, *The First Century of British Justice in India*, Oxford, 1934, pp. 214-28; Dharkar, C.D. *Lord Macaulay's Legislative Minutes Selected with a Historical Introduction*, London, 1946, p. 4

149 Cowell, Herbert, *The History of the Constitution of the Courts and Legislative Authorities in India*, Calcutta, 1872, p. 19

150 Chowdhury, Bhawani Sankar, *Studies in Judicial History of British India*, Calcutta, 1972, pp. 24 and 100; Dubey, Harihar Prasad, *A Short History of the Judicial Systems of India and some Foreign Countries*, Bombay, 1968, p. 58

151 Anderson, ' Islamic Law and its Administration .....' 1966-67 at p. 114

152 Dharkar, 1946, p. 12

by the Parliament in the year 1773 [13 George III Cap LXIII] was authorised with establishing the Supreme Court. In pursuance of this Act the Supreme Court was established by the Royal Charter dated 26 March, 1774 in Calcutta.[153] The reign of the Supreme Court is described by Lord Macaulay as a reign of terror heightened by mystery. That which was endured was less horrible than that which was anticipated. It consisted of judges not one of whom was familiar with the usages of the millions over whom they claimed boundless authority.[154] Parliament felt that the Regulating Act had been a failure not because it had been misapplied but because it was wholly inapplicable and unsuited to the wants of the country.[155] The Act of 1781[21 George III Cap LXX] was passed to explain and amend the Act of 1773. Among other things the preamble mentioned that the "inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges."[156] The Supreme Court was empowered to hear and determine all actions and suits against the inhabitants of the city of Calcutta. The Muslims were to be ruled by Muslim law and the Hindus by Hindu law in all matters of contract, inheritance to lands, rents and goods etc. Where one of the party to the suit is a Muslim or a Hindu the law and usage of the defendant is applicable. It was also provided that the Supreme Court might frame the process and make and execute the rules, in civil or criminal suits against the natives of the Presidency towns, which would accommodate the religion and manners of the natives,

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[153]Cowell, 1872, pp. 43-4

[154]Macaulay, Thomas Babington, *Macaulay's essay on Warren Hastings*, London, 1923, p. 62

[155]Cowell, 1872, p. 71

[156]Preamble, Regulating Act, 1781

so far as the same might consist with the due execution of the laws and attainment of justice.[157]

The year 1781 marks the termination of the fierce animosity and struggle between those who wished to see English law and courts of justice introduced at once into the country and rendered supreme over the executive and those who considered that such a policy was wholly impracticable. It commenced the era of independent Indian legislation[158] with perhaps less resistance than before. Therefore in the immediate succeeding legislative era of India in the struggle between the two parties there was either minor or no deviation from, or contradiction to, the religious law, custom or usage of the inhabitants of India.

2.2.2 Mufassil Towns

Whereas it is proved that rules and laws in the Presidency towns were made keeping the religious law, custom and usage of the inhabitants of India in mind, some of the writers contended that English law was enforced by practice in the Mufassil towns. It will be enough to point out that if the seat of regulation and Acts --- the Presidency towns --- were not affected by the introduction of English law, it is highly unlikely that the Mufassil considered to be of secondary importance, would have been guided by it.

According to Whitley Stokes in the Mufassil, the Islamic law of Evidence was not the law; those courts were not bound to follow the rules of English law of evidence, but there was nothing to prevent

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[157]Section 17, Regulating Act, 1781

[158]Cowell, 1872, p. 4

them from doing so. When they regarded it as the most equitable,[159] there prevailed, in addition to a few rules expressly prescribed by the Regulations made between 1793 and 1834, a vague customary law of evidence, partly drawn from the Hidaya and the decision of the Muhammadan law-officers, partly from English text-books and arguments of the English barristers who occasionally appeared in the provincial Courts and partly from the lectures on law delivered since 1855 in the Presidency Towns[160].

But on a Full Bench of the Calcutta High Court, in the case of Queen vs. Khairulla,[161] Chief Justice Peacock said:

> " It is clear that the English Criminal Law was not the Criminal Law of the Mufassil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there ..... The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the Law of the country.
> .... A code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration. By the abolition of the Mahomedan Law, the law of England was not established in its place...."[162].

It may be submitted that no regulation or law could be found by which the Muslim law was abolished. There is an obvious contradiction between Whitley Stokes and Chief Justice Peacock. While mentioning English text books, Whitley Stokes refers to, among other writers, the name of J. B. Norton.

John Bruce Norton on this point directly contradicts J. Peacock. He says, at that time the English Law of evidence, with such exceptions

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159Stokes, Whitley (ed.), *The Anglo Indian Codes*, Vol. II., Oxford, 1988, p. 812; Wilson, Sir Ronald Knyvet, *Digest of Anglo Muhammadan Law*, London, 1903, p. 33

160Stokes, 1888, p. 812

161Field, 1894, p. 17 citing 6W.R.Cr.21:B.L.R. Sup.Vol Appii

162Field, 1894, p. 17

as circumstances necessitated, was the guide in the Courts of the Mufassil. .[163]

Though Whitley Stokes says that vague customary law partly drawn from Hidaya and partly drawn from English text books prevailed, C. D. Field remarks that the English Law of evidence was not the law in the Mufassil. He refers to the judgement of J. Peacock, saying it also further decided that the rules of evidence to be found in Hindu and Mahomedan law were not binding on Mufassil Courts. His view was that *all*[164] persons admitted that the Mahomedan law of evidence was not to be followed. The whole of the English Law of evidence had never been rendered applicable to India, though some portions of it in a modified shape or otherwise, had been expressly incorporated in the statute law of this country.[165] What he meant by *all* is not made clear anywhere in his writing.

Henry Summer Maine, legal member of Council, remarked in 1868 on the introduction of the first draft Bill on evidence that

> "during the last ten or fifteen years the doctrine that the English Law of Evidence was *via propria* in force throughout the whole of the country has certainly gained strength, and the habit of applying the law with strictness is gaining ground. ..."[166]

On the other hand in 1871 in the Proceedings of the Legislative Council on 18th April, Fitzjames Stephen (Henry S. Maine's successor), when introducing the Bill which has since become law, expressed his view that it would be exceedingly difficult to say

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163Norton, John Bruce, *The law of evidence applicable to the Courts of the late East India Company*, 4th ed., Madras, 1863, pp. 5-6 quoting Arbuthnot's Select Report's Preface page xxvii

164emphasis supplied

165Field, 1894, p. 18

166Field, 1894, p. 19

precisely to what extent the English law of evidence appears to be in force in British India. .[167]

It may be pointed out that the British residents were exempted from the criminal jurisdiction of the Mufassil courts. Fitzjames Stephens vigorously argued in favour of the immunity of the British residents, in the Legislative Proccedings of the Council of India. Had the English law been in vogue in the Mufassil towns there would be no need to safeguard the British residents immunity.[168]

It may also be pointed out that even in 1853 English was not introduced as the Court language.[169] With Persian or Urdu as the main Court language it is hardly possible that all concepts of English law could have been introduced in the Presidency or the Mufassil towns.

It is evident that there was a great confusion among writers, lawyers and judges as to whether Islamic law was abolished or not. It is not clarified in their writing in what form the Islamic law was still existing, if it existed at all, or whether Islamic and Hindu law was simply made non-applicable. There is no law on this point. The trend of some writers in general was to believe that English law largely prevailed. This could be because of various reasons, e.g. lack of knowledge or understanding of the existing law or non recognition of the existing system as a proper legal system.

This assertion that English law of evidence was followed by the whole of India does not hold ground, as is clear from Fitzjames

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[167] Stephen, J. Fitzjames, *The Report of the Select Committee on the Bill to amend and define the law of Evidence*, Calcutta, 31st March, 1871; Field, 1894, p. 21

[168] Stephen, J. Fitzjames, *Minute by J. F. Stephen on the Administration of Justice in British India*, Calcutta, 1872

[169] Srivastava, Ramesh Chandra, *Development of Judicial System in India under the East India Company*, 1st ed., Lucknow, 1971, pp. 107-129, specially at p. 128

Stephen's remark immediately before the passing of the Bill of Indian Evidence Act, 1872.

From the confused writings of the above authors it is clear that Islamic law of evidence was certainly in force till 1872, with perhaps the exception of Madras. C.D. Field gives a detailed account of the applicability of Islamic law under the British rule. He says the charge against the prisoner, his confession(which was always to be received with circumspection and tenderness)[*sic*], the evidence of the prosecution, and that for the defence, were to be heard, in the presence of the judge and in that of the Qadi (a Muslim judge) and Mufti (one who gives legal opinion). The Fatwa (legal opinion) or law applicable to the case was then to be written at the bottom of the record by the Qadi and Mufti. The judges were careful to consider such Fatwa, and, if it appeared to them consonant to natural justice and to the Islamic law, were to pass sentence accordingly and issue their warrant to the magistrate for its execution, except when death or perpetual imprisonment was the punishment ordered, in which cases the execution of the sentence was to be suspended until the orders of the Nizamat Adalat were received.[170]

On this issue of administering Islamic law John Bruce Norton says that although the law formerly provided for the native law officer giving his Fatwa, this could easily be set aside; for by Reg XV of 1803, sec II. cl.3,(repealed by Act XVII of 1862) the judge might put a second question, and act upon the answer. He continues, suppose the case of a fact proved by only one witness, and that a woman, the Muslim law officer might declare the case not proved, because according to the Islamic law the evidence of a woman is not

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170Field, C.D. *Introduction to the Regulations of the Bengal Code*, 2nd ed., Calcutta, 1912, pp. 141-2

receivable. The judge might then ask --- suppose the woman were a man? The second Fatwa would declare that under such circumstances the fact would have been proved. The judge might then act upon the second Fatwa[171].

This does not exactly give a case where the rulings of the native officers were set aside. According to the jurists of Islamic law a woman could not give evidence except in female matters. It will take more than a unique case to prove that in general Islamic law was disregarded. Moreover if Islamic law was disregarded one might wonder about the necessity to ask for a second Fatwa. The judge could proceed on his own to decide the case without asking for any Fatwa, let alone the second Fatwa.

John Bruce Norton, as cited above, mentioned that the Faujdari Adalat of Madras released themselves from following Islamic law on 28th May 1829 on the basis of Reg. I of 1818. Both the regulations cited by John Bruce Norton, Reg. I of 1818 and Reg. XV of 1803, sec. II, cl.3, repealed by Act XVII of 1862 related to the criminal law. The only Act that allowed to dispense with the Fatwa, but not the Muslim law, in certain specified matters in Madras, was Act I of 1840.[172]

Definitely the English law of evidence was not introduced in all other places in India[173] until the Evidence Act,1872, was passed.[174]

Joseph Schacht on this point mentions that though the magistrates replaced the Qadis in British India, they were until 1864 assisted by

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[171]Norton, 1863, p. 6

[172]Morley, 1858, p. 92

[173]Acharya, 1914, p. 292; Bhattacharjee, Justice A. M. *Muslim Law and the Constitution*, Calcutta, 1985, p. 267

[174]Fyzee, 'An introduction to the study of ....' 1931-1932, at p. 79; Schacht, Joseph, *An Introduction to Islamic Law*, Oxford, 1964, p. 94; Wilson, Sir Roland Knyvet, *Anglo-Muhammadan Law* edited by A. Yusuf Ali, 5th ed., Calcutta and Simla 1921, p. 27; Mahomedullah, Al Haj, ibn S. Jung, *Muslim Law in British India*, Allahabad, 1932, p. 135

Maulvis (religious scholars) who gave Fatwa on the point in issue. Their version were accepted or rejected by the magistrate. Yet during the initial stages, when the magistrates wholly relied upon Muftis/Moulvis, they went so far as to apply the Hadd punishment of cutting of a hand for theft.[175] It may be worth mentioning that though Fatwa ceased to be a source of official law for judgement in 1864, it continued to play its part in the everyday personal and collective lives of the Muslims in India. Fatawa (plural of Fatwa) were issued in socio-political situations, e.g. Fatwa for or against Khilafat (Caliphate), non co-operation, and the migration movement, the issue of Pakistan etc.[176]

2.2.3 Regulations and Acts before the Evidence Act of 1872

A series of Regulations[177] and Acts[178] were passed for a period of 77 years in matters relating to evidence and witness testimony[179] All the laws passed after the 1781 era saw a greater understanding of the existing law of the country.

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[175] Schacht, 1964, p. 95 f.n.1; Rashid, 1985, p. 36; Wilson, Sir Roland Knyvet, *An introduction to the Study of Anglo Muhammadan Law*, London, 1894, at p. 125

[176] Khan, Dr. Shafiq Ali, 'Allamah Shabbir Ahmad Usmani' in *Journal of the Pakistan Historical Society*, 1988, Vol. XXXVI, Part II, pp. 133-177 at p. 144

[177] Bengal Regulations IV of 1793, IX of 1796, IV of 1797, VIII of 1803, III of 1812, XXIII of 1814 and XXIV of 1814, Bombay Regulations IV, XII and XIII of 1827 and Madras Regulations III of 1802, IV of 1802, V of 1802 VII of 1802 VII of 1809, XII of 1809, IV of 1816, V of 1816, VI of 1816, VII of 1816, X of 1816, XIV of 1816, IV of 1821 and VIII of 1832 deal with the law of evidence.

[178] The Acts that were passed relating to the law of evidence are Act X of 1835, Act XIX of 1837, Act V of 1840, Act IX of 1840, Act VII of 1841, Act VII of 1844, Act XV of 1852, Act XIX of 1853 enforceable in the Bengal Presidency, Act II of 1855, Act X of 1855 enforceable in Bombay and Madras, Act VIII of 1859 is the Civil Procedure Code containing some rules of procedural evidence, Act XXV of 1861 is the Code of Criminal Procedure containing procedural rules of evidence and Act XV of 1869.

[179] Stokes, 1888, see for details, pp. 812-7

It will be seen from a summary of the regulations and the Acts that the bulk of the codification dealt with the procedural matters of summons, attendance of witnesses, compellability of a witness, examination of a witness, examination of absent witnesses, language of the deposition, punishment for refusal to give evidence or giving false evidence, oath and affirmation, reminder by a pious person not to lie, admissibility of new evidence, etc. All these matters seems to be a codification of the existing practice. The regulations relating to village munsif, village panchayet, district munsif and district panchayet seems to be the codified form of the existing customary law. The privilege extended in particular to a female witness or a witness of rank or caste also reflects the existing law. Confession of an accused is expressly defined to be accepted according to the rules of the Muslim law.

The substantive changes were brought regarding competence of witnesses. This included the admissibility of a non-Muslim witness in criminal cases in Bengal [Section 56, Bengal Regulation IX of 1793]. It was declared in Bombay that all persons are competent witnesses who have arrived at years of discretion and are of sane mind [Section XXXIII, Cl. First, Bombay Regulation IV of 1827]. It further laid down that if either party objects to the examination of a witness on the ground that he is a convicted person or relative of the party, or an inimical and interested witness, the objection if true will be entered in the minutes of the proceedings. The Court may receive the evidence of such a witness if it seems conducive to the end of justice [Section XXXIII, Cl. Second, Bombay Regulation IV of 1827]. This rule is extended to criminal cases [Section XXXV, Cl. First, Bombay Regulation XIII of 1827]. The accomplice could be pardoned on his promising fully and faithfully to disclose all the

circumstances within his knowledge and to give his evidence throughout the trial without prevarication or fraud in a case of murder or other offence of highly atrocious nature. The pardon could only be granted if it appeared that the prosecution would fail altogether and it is necessary to procure the conviction or apprehension of criminal/s [Section XXXIV, Cl. First, Bombay Regulation XII of 1827]. The evidence of an accomplice shall operate against a prisoner if it corroborates with other witnesses or strengthens impressions produced by the circumstances [Section XXXV, Cl. Second, Bombay Regulation XII of 1827]. The pardon to an accomplice in treason cases will be directed by the government[Section XXXVI, Bombay Regulation XII of 1827]. In Madras it was laid down that in a criminal trial, the judge shall direct the examination of a witness despite the objection raised by the Muslim law officer, on the ground that the witness is a non-Muslim, or a police officer, or a government officer of any description, or any other ground if it seems unreasonable and insufficient to him [Section VIII, Madras Regulation I of 1825]. The power to dispose of the case in similar circumstances was relaxed in 1829 [Section I, Madras Regulation VI of 1829].

Act XIX of 1853 and Act II of 1855 contained mostly the substantive law of evidence and was of some importance compared with the others. It is to be noted that Act XIX of 1853 was applicable to Bengal only. Therefore the substantive changes of importance only had an impact from 1855 when Act II of 1855 was enforced.

The Acts on procedural matters put emphasis on summons, compelling the attendance of a witness, examination of a witness, language of the deposition, commission, punishment for giving false evidence, etc.

The substantive changes that were brought by the Acts are mostly related to the competency of a witness.

The convicted persons evidence is made admissible in civil or criminal cases, [Act XIX of 1837, Act VII of 1844], and relatives of the party [Section 3, Act XIX of 1853], and interested witnesses [Act IX of 1840, Act VII of 1844, Section3, Act XIX of 1853], are made competent witness. Parties were made competent and compellable witnesses [Section, 2, 3, Act XV of 1852, Act XIX of 1853]. Initially husband and wife were declared not to be compelled to give evidence for or against each other[Section 4, Act XV of 1852]. Later the rule laid down in Bengal was that husband and wife may be examined for or against each other. The exception is extended to communications between married persons, which are considered to be privileged unless the marriage is in dispute [Section 4, Act XIX of 1853] .

Act II of 1855 is considered to contain a substantive part of the law of evidence before the Act of 1872 was passed. Some of the above rules of competency were re declared by this Act. For example, no one is considered to be incompetent due to interest in the suit or relationship with the parties to the suit [Section 18], parties to the civil suit are competent witnesses and may be compelled to give evidence as witnesses and produce documents [Section 19], and husband and wife are considered to be competent witnesses for or against each other in civil suits. Communications during marriage shall be considered as a privileged matter unless the marriage is in dispute [Section 20]. To this it added that a child under the age of seven years who is incapable of understanding questions and giving rational answers is incompetent as a witness [Section 14, cl. 1], and a person of unsound mind is incompetent as a witness [Section 14, cl. 2]. This Act declared that the evidence of one witness who is entitled

to full credit shall be sufficient proof in a case. This will not apply to cases of treason, perjury or to the testimony of accomplices [Section 28]. This Act also dealt with the absent witnesses. A dying declaration was considered as good evidence in spite of the subjective hope of recovery by the dying person[Section 29]. It laid down a list of documents that will be admissible in evidence in particular circumstances, e.g. transactions in the ordinary course of business [Sections 39-44], judicial notice of certain documents [Sections 2-6,11], documents that are proved to be authentic [Sections 7-10,13]. It also laid down a few sections regarding what may be proved [Section12, 35, 37, 36,49] or what will be *primafacie* evidence of a certain fact [Section38, 5], or what the court may presume[section 50] dealing with documents that the court may consider to be the proof of certain fact.

It may be noted that the changes brought regarding the competency of witness in the Act of 1855 are akin to the reform brought in England in 1843 and 1853.[180] The literature on evidence began to increase in the early years of the nineteenth century[181] and the rules on the law of evidence took shape by then.[182] One would wonder how much the common law system was itself influenced by the laws of its colonies. Since this thesis does not intend to draw a comparison of the English law of evidence with the Islamic law or Evidence Act,1872 this question will not be discussed further.

The attention given to the existing law is obvious from the repeated references to laws, customs and usages of the country mentioned in most of the regulations and Acts. It will also be seen from the next

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[180]Cross, 1985, pp. 188-9 and 192-3

[181]Nokes, 1962, p. 23 also see for details pp. 16-29.

[182]Holdsworth, Sir William, *The History of the English law*, Vol. IX, 3rd ed., London, 1944, 2nd imp, 1976, pp. 185-197

chapter that the substantive changes that were brought into the law of evidence do not contradict the Islamic law in essence. The law of evidence seems so far to have been the rearrangement mostly of the existing law in a codified form.

2.2.4 Need of a Codified Law

It was asserted by the members of the legal council that laws relating to both civil and criminal, were for a long time not provided with any proper rules of evidence.[183] The Islamic law of evidence did not govern their proceedings: (Mir Khedmath Ali vs. Mussamat Nasirannissa, II sev. 449) and an Act (II of 1855) passed "for the further improvement of the law of evidence" introduced a certain amount of difficulty, inasmuch as it assumed the English rules of evidence to be in force in the Mufassil Courts, which was not actually the case save in so far as they had been adopted as a source of guidance where the legislature had not laid down any authoritative rule.[184]

In the appendix to the third report of commissioners of 1861 it was said that the members were giving attentive and anxious consideration to the means of remedying the great defects in the state of the laws in India to which they have now averted. They arrived at the conclusion that India needed a body of substantive civil law based on English law, but which once enacted should itself be the law of India on the subjects it embraced.[185]

183Stokes, 1888, p. 58
184Field, 1912, p. 182
185Stokes, 1888, p. 58

Here it is also clear that there is a great confusion as to the law applicable in the country and the self serving statement for codification by the commissioners.

One of the appropriate reasons for the need of a codified law would seem to be that a system of law was necessary to safeguard the English landowners in the Mufassil towns. The three Presidency towns formed only a little portion of the vast empire where the rights of the British settlers were safeguarded. The rest of the empire in the form of Mufassil towns was ruled by the Islamic, Hindu or customary law. The English traders were exempt from the application of the Islamic criminal laws[186] and the decisions of the native judges.[187] A system of law was necessary for the future administration of the country for prospective business.

The other reason could be the debate in Benthamite England on the issue of re-arranging the existing law. It is claimed that Bentham's teaching has borne fruit in India.[188] It is to be noted that Bentham is considered as one of the greatest reformers, perhaps the greatest, in the history of English law.[189] The characteristic of Bentham's work provoked ambivalent reactions in England. He was both much criticized and admired in his lifetime and after for his thought and theories. The pattern of debate in many respects was established by the time of his death.[190]

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[186]Morley, 1858, p. 156

[187]Section 13, 68 Bengal Regulation XXIII & Section 7, XXIV of 1814; Madras Regulation VII & VIII of 1827; Section 72, Bombay Regulation IV of 1827

[188]Rankin, Rt. Hon. Sir George Claus, *Background to Indian Law*, Cambridge, 1946, p. 138

[189]Twining, William, *Reading Bentham Maccabean Lecture in Jurisprudence*, London, 1989, p. 98

[190]Twining, William, *Theories of Evidence*, London, 1985, pp.100-108

2.2.5 Enactment of The Evidence Act, 1872

At length, a code of evidence was drawn up and passed into law (Act I of 1872) under the auspices of Fitzjames Stephen. The Evidence Act was passed during the *interregnum* between the resignation of the third law commission in 1870 and the appointment of the fourth law commission in 1879.[191] The provisions of this Code apply to both civil and criminal proceedings.[192] The preamble to the Act shows that it was intended to be a complete code of evidence, but it was not complete and not well arranged in certain respects. It is not only a fragmentary enactment but a consolidated one repealing all rules of evidence other than those saved by the last part of section 2 of the Act.[193]

It thus appears from the writing of Whitley Stokes, though erroneous, that down till 1872 the Mufassil Courts had hardly any fixed rules of evidence except those contained in Act XIX of 1853 and II of 1855.[194] It is to be noted that Act XIX of 1853 only applied to Bengal. Therefore it can be claimed that Mufassil Courts were governed by the existing law of the country until Act II of 1855 was passed. But this observation is also debatable. The commissioners were appointed in England to prepare a body of substantive laws for India. Accordingly they framed a draft code of the law of evidence containing 39 sections. In the fifth report on the draft code of evidence in 1868 the commissioners admitted that much of the English practice was unsuited to the various states of society and different forms of property which are to be met with in India.[195] In

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[191] *The Report of the Law Reform Commission, 1967-70* Karachi, 1970, p. 97

[192] Field, 1912, p. 182

[193] Stokes, 1888, pp. 833-38

[194] Stokes, 1888, p. 817

[195] *Fifth Report of the Majesty's Commissioners appointed to prepare a body of substantive law for India*, London,1868; Jain, M. P. *Outlines of Indian Legal*

October 1868, after adding two more sections, this draft code was introduced by Henry Summer Maine, and referred to a Select Committee, as a Bill to define and amend the law of evidence.[196] This Bill was published in the Gazette and circulated to local authorities for general information[197] but never got beyond the first reading. It was circulated for opinion to the local governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of the country. The chief objection to it was that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected of them.[198]

A new Bill of 163 sections in a form different from the present Evidence Act of 1872 was therefore prepared by Fitzjames Stephen. The new Bill was printed, circulated and is supposed to have been very freely criticised.[199] It is not clear if it was criticised by the people of the country for whom the law was to be passed most of whom, even the elites did not then know English. Fitzjames Stephen recast it and it ultimately passed as Act I of 1872. In the report of the Select Committee under the auspices and guidance of Fitzjames Stephen it was said that, in general, the object was to reproduce English law of evidence with certain modifications, most of which were suggested by the commissioners, though with some of them this

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History, 3rd ed., Bombay, 1972 p. 568; Rankin, George Claus, *Background to Indian Law*, Cambridge, 1946, p. 116

196*Abstract of the Proceedings of the Council of the Governor General of India*, Vol. VII 1868, p. 480

197*Abstract of the Proceedings of the Council of the Governor General of India*, Vol. IX , 1870, p. 401; *Gazette of India*, November 7 and 14, 1868.

198Stephen, Fitzjames, *The Report of the Select Committee*..... 31st March, 1871; Stokes, 1888, p. 817

199*Abstract of the Proceedings of the Council of the Governor General of India*, Vol. XI p. 120-141, 1872; *Gazette of India*, June 24 and July 8 of 1871

was not the case. Then the report proceeds to say the English law of evidence appeared to them as totally destitute of arrangement. This arose partly from the circumstance that its leading terms are continually used in different senses, and partly from the circumstance that the law of evidence was formed by degrees out of various elements, and in particular out of the English system of pleading and the habitual practice of the Courts of Common Law. It further says the text books are seldom systematically arranged perhaps due to the extreme intricacy of the law, and the total absence of anything like system which pervades every part of it. The report, further explaining the basis of the Evidence Act,1872, just says that the Committee has arranged the material. The remark of Fitzjames Stephen about the English law which was the basis of the Evidence Act,1872, is that this law as introduced in India by the lawyers and *quasi*-lawyers was directed by 'justice, equity and good conscience'. He says, these attractive words mean little more than an imperfect understanding of an imperfect collection of not very recent editions of English text-books. It is difficult to imagine anything less satisfactory than such a state of the law as this. He states, a half-and-half system in which a vast body of half-understood law, totally destitute of arrangement, and of uncertain authority, maintains a dead-alive existence, and is a state of things which is by no means easy to praise.[200] Dr. J. Duncan M. Derrett says justice, equity and good conscience is a nice comfortable formula

200Stephen, Fitzjames, *The Report of the Select Committee* .....31st March, 1871; Field, 1894, p. 18

meaning as much or as little as the judges for the time being care to make it mean.[201].

The confused state of mind of authors of the Bill is also manifest. The first Bill did not become the law because, it appears from the critics, it assumed acquaintance with English Law. The second Bill was therefore passed as the law of the land taking into account the legal system prevailing in India.

Undoubtedly English law was not introduced as it did not suit the land and as there were many differences. Whitley Stokes has drawn a long list of differences between the Indian law of evidence and the English law of evidence.[202] If English law was introduced at all could one not argue that English common law was influenced by Islamic law.[203] It may be claimed that whereas Islamic law was based on inquisitorial system, the present system in Pakistan and Bangladesh is based on adversarial system. But in answer to that it can be argued that the present system of Pakistan and Bangladesh is not purely adversarial. The role of the judge is not that of an umpire. The system is a combination of both inquisitorial and adversarial process. moreover Islamic law as practised in India was also not purely inquisitorial in nature. It had some characteristic of adversarial process as is evident from the discussion above.[204] B. Jain, an Indian writer says that he is convinced that the present system of justice in the country is not absolutely new, but is an

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[201] Derrett, Dr. J. Duncan M. 'Justice Equity and Good Conscience' pp. 114-153 at p. 115 in *Changing Law in the Developing Countries* edited by J.N.D. Anderson, London, 1963

[202] Stokes, 1888, pp. 827-33

[203] John Makdisi argues, that the law relating to recovery of land in common law was influenced by Islamic law, in his article, 'An enquiry into Islamic influences during the formative period of the Common Law' in *Islamic Law and Jurisprudence* edited by Nicholas Heer, Seattle, 1990, pp. 135-46; To develop such a theory much more comparative research work is needed.

[204] see chapters 2.1.4 and 4.2.4

evolution of the system in force in the 17th century in India.[205] Indian jurisprudence is a growth moulded by Indian circumstances and Indian conditions to suit the country's peculiar needs and possesses its own special features and characteristics.[206] However it is to be accepted that there are some universal rules which are applicable to all systems from time immemorial, e.g. calling a plaintiff and a defendant to ask them to produce proof in their favour,[207] and codifying any such rules in a neat form cannot be considered as an exclusive law belonging to a nation.

2.2.6 Adoption of the Indian Evidence Act, 1872

The Indian Evidence Act,1872 which was passed during the British rule became the law of India along with other existing laws after its independence in 1947 by section 18 of the Indian Independence Act, 1947. At the same time the Evidence Act of 1872 and other existing laws were made applicable to Pakistan after partition with India by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 and in accordance with section 9(1) and 18(3) of the Indian Independence Act, 1947.[208] In 1949 the word 'Indian' was deleted from the title 'the Indian Evidence Act, 1872' in Pakistan.[209]

Bangladesh, the erstwhile East Pakistan, after seceding from Pakistan in 1971, adapted retrospectively all the laws in force in Pakistan in 1971 by the Bangladesh (Adaptation of Existing Laws) Order 1972 and treated them as existing laws, in accordance with

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[205] Jain, 1970, p. 97

[206] Setalvad, M.C. *The Role of English Law in India*, Jerusalem, 1966, p. 19

[207] Nokes, 1962, pp. 16-7

[208] The Indian Independence Act 1947 [10 and 11 Geo. 6, Ch.30] was repealed by article 2(21) of the Constitution of Pakistan of 1956, M.C. Mowla v. Bangladesh 1980 BSCR 20 at p. 22

[209] Governor General Order 4 of 1949, Schedule.

articles 149 and 152(1) of the Constitution of the People's Republic of Bangladesh. By this the Evidence Act,1872, became the law of Bangladesh.

While India and Bangladesh still follow the Act of 1872 in general, in 1979 and 1984 Pakistan brought some major changes in the existing law of evidence. In the process of Islamisation of the country four Hudud laws were passed in 1979, and in 1984 the Qanun-e-Shahadat was introduced. The following sub chapter will deal with the changes in Pakistan.

2.3 Recent Developments in Pakistan and Bangladesh

President Zia-ul-Haq (remained in power from July 1977 to 30th December, 1985) placed great reliance on the establishment of an Islamic State (Nizam-i-Islam) in Pakistan after July 1977,[210] when he came to power. The Islamic Ideology Council working under the 1962 Constitution and set up under the 1973 Constitution was reactivated, and constituted by General Zia in September 1977 in order to prepare an outline for an Islamic State.[211] The Council was again reconstituted in May, 1981.[212] It was done with the view that as Pakistan was created in the name of Islam, it could survive only if it adhered to the Islamic principles and that the western system did not suit the genius of the people.[213] In 1951 The Ulema(the religious scholars) held a Convention in Karachi from January 21-24 which formulated fundamental principles of the Islamic State. The outcome

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[210] Kennedy, Charles, H. *Bureaucracy in Pakistan*, Karachi, 1987, p. 2

[211] Choudhury, Golam Wahed, *Pakistan Transition from Military to Civilian Rule*, Essex, 1988, p. 130; Choudhury, Golam Wahed, *Islam and the Contemporary World*, London, 1990, p. 206; Pasha, Ahmed Shuja, *Pakistan a Political Profile 1947 to 1988*, Lahore, 1991, p. 303

[212] Choudhury, 1990, p. 206,

[213] Iqbal, Dr. Afzal, *Islamisation of Pakistan*, Delhi, 1984, p. 119; Pasha, 1991, p. 302

of this Convention took the shape of 22 points in the Objective Resolution. In 1980 in a two day Ulema convention, adoption of the 22 point programme of the Objective Resolution of 1951 as the basis of process of Islamisation of the country was announced.[214] This was reiterated in 1983.[215]

The First Constituent Assembly of Pakistan on 7 March 1949 passed a Resolution which was then adopted as the Objective Resolution.[216] This was then adapted in the Preamble of Pakistan Constitution of 1956, 1962 and 1973.[217] The objective of the Resolution was passed on March 23, 1940 by the Muslim League and had the objects to attain the freedom and implementation of the ideology of Islam in the collective life of the new State.[218] It may be mentioned here that this programme of Islamisation remained part of erstwhile East Pakistan, now Bangladesh, until 1971 when it seceded from Pakistan. Bangladesh is overwhelmingly Muslim in composition and culture.[219] Islam represents a powerful force in Bangladesh.[220] Bangladesh, (then East Pakistan) seceded from Pakistan, (then West Pakistan) on an ideological revolution of secularism as against the Islamic ideology of united Pakistan.[221] One of the cardinal principles of the first Constitution of Bangladesh adopted on November 4, 1972 was secularism. Article 12 of the Constitution laid down the means for realisation of the same. The war of 1971 was

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214 Syed, Riaz Ahmed, *Pakistan on Road to Islamic Democracy Referendum*, Islamabad, 1984, p. 23

215 *Viewpoint* edited by Mazhar Ali Khan, Lahore, January 27, 1983, p. 12

216 Syed, 1984, p. 19

217 Mst Sakina Bibi v. Federation of Pakistan PLD 1992 Lahore 99 at pp. 110-3

218 Syed, 1984, p. 32

219 Baxter, Craig, *Bangladesh A New Nation in an Old Setting*, London et al, 1984, p. 113

220 Gulati,ChandrikaJ., *Bangladesh:Liberation to Fundamentalism a study of volatile Indo-Bangladesh Relations*, New Delhi, 1988, p. 222

221 Banu, UAB Razia Akter, *Islam in Bangladesh*, New York et al. 1990, p. 96.

thought to have removed Islam from its prominent position in the society. But within a few years of independence, the overwhelming presence of Islam was becoming evident in all sections of Bangladeshi society. Although initially constitutionally Bangladesh was secularised, the nature of the society could not be altered.[222] The concept of secularism eroded away by the first half of the 70's. When Zia ur Rahman assumed power in 1975 the words 'Absolute faith and trust in the Almighty Allah' replaced the word secular in article 8 by the 5th amendment to the Constitution of Bangladesh.[223] Article 12 was altogether removed. Article 25 was amended and clause 2 declared that the state shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity. When the government changed in 1981, this legacy continued.[224]

During the Ershad regime on June 8, 1988, the Jatio Sangsad (Parliament) passed the 8th Constitution (Amendment) Bill by which article 2A was inserted declaring Islam to be the state religion.[225] Ever since his ascent to power Ershad stressed on the Islamic identity of Bangladesh insisting that the country should run according to the Sunna and that Islam should be duly enshrined in the future Constitution of Bangladesh.[226] Article 8(1) and article 25 (2) of the

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[222]Huque, Ahmed Shafiqul and Muhammad Yeahia Akhter, 'The Ubiquity of Islam : Religion and Society in Bangladesh' in *Pacific Affairs*, at pp. 200 and 203

[223]Proclamations Order No. 1 of 1977; Ahamed, Emajuddin and D. R. J. A. Nazneen 'Islam in Bangladesh Revivalism or Power Politics?' in *Asian Survey*, Aug. 1990, Vol. XXX, No. 8, pp. 795-808 at p. 795

[224]Siddiqua, Begum Asma, *Laws of Marriage and Divorce in Bangladesh Today*, LL. M. Dissertation, University of London, 1989, p. 115

[225]Act XXX of 1988; Rahman, Syedur, 'Bangladesh in 1988 Precarious Institutions Building Amid Crisis Management in *Asian Survey*, Feb. 1989, Vol. XXIX, No. 2, pp. 216-222 at p. 218

[226]Gulati, 1988, p. 231

Constitution of Bangladesh is similar to no. 1 and parts of no. 5 of the 22 point Objective Resolution of 1951[227] respectively.

One of the factors that has contributed to the Bangladesh Nationalist Party's electoral success is the importance given to religion.[228] The present Prime Minister, Begum Khaleda Zia, wife of former President Zia ur Rahman adheres to the policy ensued by her late husband.

In February 1979 four Hudud laws were codified and introduced in Pakistan. Side by side with the High Courts, Federal Shariat Court was set up as an independent Court in 1980 for quick justice and effective implementation of Islamic laws. Arrangements were made in the Islamic University at Islamabad set up in 1980 to impart training to the sessions judges and additional sessions judges from various districts of the country in the field of Islamic laws. A Sharia Faculty was established on October 8, 1979 in the Quaid-e-Azam University at Islamabad. This Faculty had special arrangements for instructions in Sharia law for students of postgraduate level.[229] The Advisory Council of Islamic Ideology had recommended revision of syllabuses concerning law in the various universities of the country.[230] It seemed that the work of Islamisation was proceeding in an imperceptible manner. On 28th October, 1984 The Qanun-e-Shahadat 1984 was launched. In 1992, the Criminal Law (Third Amendment) Ordinance[231] introduced the Qisas and Diyat laws in the Pakistan Penal Code, 1860. In 1991 The Sharia Act[232] was passed which made

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[227] see Syed, 1984, pp. 25-27 for the complete 22 points Objective Resolution.

[228] Baxter, Craig and Syedur Rahman, 'Bangladesh Votes-1991 Building Democratic Institutions' in *Asian Survey*, Aug. 1991, Vol. XXXI, No. 8, pp. 683-693 at p. 691

[229] Choudhury, 1990, pp. 206-210; Pasha, 1991, pp. 304-308

[230] Choudhury, 1988, p. 134

[231] Ordinance X of 1992

[232] Enforcement of the Shari'ah Act, 1991 [Act X of 1991]

the Holy Qur'an and the Sunna the supreme law of the land. This Act was first introduced as a Bill in 1985 and as an Ordinance in 1988. As it was not passed by the legislature it came again as a Bill in 1990 and was passed by the legislature in 1991. The country, through the Sharia Act, makes a solemn pledge to adhere to Islamic doctrines on all aspects of life. It is yet to be seen in the modern economic context of Pakistan, how Islam is going to be able to adapt and evolve with the society.[233]

The Hudud laws passed in 1979 and some of the provisions of the Qanun-e-Shahadat 1984 were considered by many as most retrogressive, since these measures took away the rights of equality of women guaranteed by the Constitution of Pakistan.[234]

Bangladesh did not have a similar legislative development as Pakistan. But it may be noted in this context that an Islamic University was also set up in Bangladesh in the same year as Pakistan. It has a department named Sharia and Jurisprudence. It is understood that apart from a few subjects on Islamic norms it is the same as any other law department of other universities. Unlike Pakistan it has not undertaken any training scheme for judges or students or any serious exploration of Islamic law as such. But Bangladesh has always been influenced in whatever mild way, by the Islamisation in Pakistan. It seems that there is a awakening and resurgence of Islam in Bangladesh.[235] It is further claimed that Bangladesh will cooperate with Pakistan because of its long bondage

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[233] Sattar, Naeela K., 'Reflections on Pakistan's Sharia Law' in *Bangladesh in International Affairs* May 1991, Vol. 14, Number 5, pp. 5-12 at p. 11

[234] Iqbal, 1984, pp. 42-53; Article 25(2) of the Constitution of the People's Republic of Pakistan guarantees that there shall be no discrimination on the basis of sex alone.

[235] Choudhury, 1990, p. 213

of Muslim brotherhood, and economic dependency or co-operation.[236]

The relevant portions of the Qanun-e-Shahadat,1984, the four Hudud laws of 1979 and the relevant portions of Pakistan Penal Code,1860 relating to testimony and confession are discussed respectively. The Qanun-e-Shahadat and the Pakistan Penal Code are general law whereas the Hudud laws are special law.

2.3.1 Qanun-e-Shahadat,1984

In the process of Islamisation Pakistan has brought some key changes in some of the sections of the Evidence Act, 1872 and rearranged it. Instead of calling these changes a modification, amendment or improvement it has been declared as a new Order, The Qanun-e-Shahadat,1984. This Order has 166 articles in total. One less than the Evidence Act,1872. It has introduced 5 articles which do not have any corresponding sections in the Evidence Act,1872. They are articles 44 and 163-6. Sections 2, 81, 82, 93, 113, 119, 120 and 166 of the Evidence Act,1872, do not appear in any form in the Qanun-e-Shahadat. There are other sections of the Evidence Act,1872 that appears in an amended form in the Qanun-e-Shahadat. Some of the amended provisions and the new articles relevant to this study are discussed here.

In the preamble of the Qanun-e-Shahadat it is stated that this law was made to revise, amend and consolidate the law of evidence so as to bring it into conformity with the injunctions of Islam as laid down in the Holy Qur'an and the Sunna.

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[236] Rahman, Ataur, *India Pakistan and Bangladesh conflict or co-operation*, Dacca, 1976 pp. 79-80

Article 3 of the Qanun-e-Shahadat deals with the qualification and competence of a witness to testify. This article is identical to section 118 of the Evidence Act with the addition of three provisos.

The first proviso mentions that a person shall not be a competent witness to testify if he has been convicted by a Court for perjury or giving false evidence. The second proviso clarifies that this rule mentioned in the first proviso shall not apply to a person about whom the Court is satisfied that he has repented and mended his ways. As a safeguard the third proviso states that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qur'an and Sunna, for a witness, and where such witnesses are not forthcoming the Court may take the evidence of a witness who may be available.

Article 17 is an extension of article 3. The corresponding section to article 17 in the Evidence Act is section 134. This article lays down the rule that the competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and the Sunna. It further says that for all matters the Court may accept or act on the testimony of one man or one woman, or circumstantial evidence, except in Hudud cases and financial obligations.

In financial or future obligations if reduced to writing the instrument shall be attested by two men or one man and two women, so that one may remind the other if necessary and evidence shall be led accordingly.

Article 16 is similar to section 133 of the Evidence Act. It does not deviate from the former rule that an accomplice is a competent witness against an accused person. The exception made by

amendment is that offences punishable with Hadd will not come within the purview of this section.

Article 42 is the reproduction of section 29 of the Evidence Act with a proviso added to it. This proviso makes an exception to the rule of ' a relevant confession according to law remains relevant though made in promise of secrecy' in Hudud cases. Therefore if in a trial of a case under the laws relating to enforcement of Hudud, a person confesses his guilt, under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or in answer to questions he need not have answered whatever may be the forms of these questions, or because he was not warned that he was not bound to make such confession, this confession shall be considered as inadmissible in a Court of law. One would wonder whether the person making confession under drunkenness would not attract articles 6-11 of The Prohibition (Enforcement of Hadd) Order,1979.

Article 43 is an improvement to section 30 of the Evidence Act. It lays down the rule that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons is proved such confession shall be proof against the person making it; the Court has a discretion in that it may or may not take into consideration such confession as circumstantial evidence against the other persons. Under section 30 of the Evidence Act, on the other hand such a confession was evidence against not only the person making it, and but also his accomplices.

Article 44 is a new article. There is no corresponding section in the Evidence Act. It makes all accused persons and accomplices liable to cross examination.

Article 71 is similar to section 60 of the Evidence Act except that a new proviso is added at the end of this article. The new proviso is related to article 46 of the Qanun-e-Shahadat corresponding to section 32 of the Evidence Act. The new proviso in article 71 provides that a party shall have the right to produce Shahada ala al-shahada, i.e. by which a witness can appoint two witnesses to depose on his behalf in cases where the witness is dead, or cannot be found, or has become incapable of giving evidence, or his attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case the Court regards as unreasonable. The rule of Shahada ala al-shahada will not apply in cases of Hudud. Shahada ala al-shahada may be described in English as testimony on testimony.

Article 79 is the reproduction of section 68 of the Evidence Act. with the amendment that the provision for two attesting witnesses has been made instead of one attesting witness. This article makes it imperative that in cases where a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the Court and capable of giving evidence.

Attestation means witnessing of actual execution and not of mere acknowledgement of execution by the executioner.

Suppose according to article 17(2)(a) of the Qanun-e-Shahadat a matter pertaining to financial or future obligations is reduced to writing and attested by one man and two women. Later this document is required for proof in the Court. If the man is not available or the man and one of the women is not available, questions may be raised as to whether the proof offered by the two women or one woman

only will suffice the requirement under article 79. Answer to these either in the positive or in the negative will give rise to further questions and presumptions.

Article 163 does not have any corresponding section in the Evidence Act. It states that when the plaintiff takes an oath in support of his claim the Court shall on the application of the plaintiff call upon the defendant to deny the claim on oath. This article contains the basic law of starting a civil procedure on the claim of a plaintiff. On the denial of the claim by the defendant the question of producing witnesses and evidence arises.

This rule do not apply to laws relating to the enforcement of Hudud or other criminal cases.

Article 164 also do not have any corresponding section in the Evidence Act. According to this article the Court may allow the production of any evidence that may have become available because of modern devices or techniques in such cases it may consider appropriate.

This article seems to contain an educating rule, a reminder that although Islamic law is believed by many to be appropriate for medieval ages it is applicable even today.

Article 165 overrides other laws and article 166 has repealed the Evidence Act,1872 (1 of 1872).

It seems that there was not any strong objection to the launching of Qanun-e-Shahadat except for Clause 18 of the Draft Evidence relating to the status of women. In 1982, the Council of Islamic Ideology proposed to bring the law of evidence in conformity with Islam. The Qanun-e-Shahadat went through four drafts.[237] Clause 18 of the

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[237] Mumtaz, Khawar, and Farida Shaheed, *Women of Pakistan Two Steps Forward One Step Back*, Lahore, 1987 pp. 106 and 109

Draft Evidence which is in the form of article 17 in the Qanun-e-Shahadat was adopted after an animated closed door 95 minute meeting in the Chairman's Chamber at the eleventh-hour. Though the Draft Evidence generated heated controversy in the country due to Clause 18, almost all the women members of the Majlis have put their signatures to the clause.[238]

2.3.2 Hudud and Qisas Laws

A few crimes are mentioned in the Qur'an. The punishment for the commission of these crimes and the procedure to prove it is either prescribed in the Qur'an or the tradition of the Prophet or in the tradition of the first four Khalifahs of Islam.[239]

These laws on crime, along with the sentences and methods of punishment and the procedures to prove them are known as Hudud laws. All other civil wrongs and crimes are known as Tazir.[240] Qisas forms a category of its own. The word Hudud is the plural of an Arabic word Hadd, which means prevention, restraint or prohibition, hindrance, impediment, limit, boundary, frontier etc. The word Hadd in philosophy, logic, metaphysics acquires a different meaning. In legal terms Hadd means a specified punishment for some specified forbidden acts as understood to have been sanctioned in the Qur'an or the Sunna of the Prophet.[241] Tazir in its primitive

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[238] *Viewpoint*, March 10, 1983, pp. 13-5; Patel, Rashida, *Islamisation of Laws in Pakistan*, Karachi, 1986, pp. 78-82; also see Kennedy, Charles H. 'Islamization and Legal Reform in Pakistan 1979-1989' in *Pacific Affairs*, 1990, Vol. 63, No. 1, pp. 62-77 at pp. 68-69

[239] Bukhari, 1979, Vol. III, pp. 486-527 and Vol. VIII, pp. 503-517

[240] Lippman, Matthew, Sean Conville and Mordechai Yerushalmi, New York et al, 1988, pp. 37-57; for details on kinds of Tazir see El-Awa, Mohammad, 'Ta'azir in the Islamic Penal System' in *Journal of Islamic and Comparative Law*, 1976, Vol. 6, pp. 41-59

[241] *The Encyclopaedia of Islam*, New Edition, edited by B. Lewis, V. L. Menage, Ch. Pellat and J. Schacht, Leiden and London, 1971, Vol. III, pp. 20-2; for

sense means prohibition and instruction. In law it signifies an infliction undetermined in its degree by the law, on account of the crime involving public right or of the crime involving private rights.[242] The occasion of it is in any offence for which Hadd has not been appointed whether that offence consist in word or deed.[243] In Tazir the Qadi is allowed discretion both as to form in which such punishment is to be inflicted and its measure.[244] Qisas means equality or equivalence. It implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person.[245]

The Hudud offences are considered as Zina [Sura Nur 24 : 2] or illicit sexual relation, Qadhf [Sura Nur 24 : 4] or accusation of Zina, Sariqa [Sura Maida 5 : 38] or theft, Harabah [Sura Maida 5 : 33] or highway robbery or dacoity, Shurb al Khamr [Sura Maida 5 : 91-92] or drinking of alcohol and Ridda [Bukhari, Vol. 9, pp. 42-47] or apostasy. The word Zina covers both illicit sexual relations between married and unmarried persons. The marital status is important for the way punishment will be meted out to the parties. Sura Maida 5:91-2 are the last verses in sequence to forbid drinking of alcohol. The previous two verses are Sura Baqara 2:219 and Sura Nisa 4:43 respectively. The verse forbidding alcohol does not provide any prescribed punishment. This was later developed by the jurists. There are a few verses on Ridda in the Qur'an. They are Sura Baqara

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details on the meaning of Hadd see Muhammad Abdul Aleem, *The Hadd Punishments in Islamic Law*, Ph. D. Thesis, London University, 1955

[242] *The Encyclopaedia of Islam*, edited by M. Th. Houtsma, A. J. Wensinck, H. A. R. Gibb, W. Heffening and E. Levi-Provencal, Leyden and London, 1933, Vol. IV, Part 2, p. 710

[243] *Hedaya* , 1791, Vol. II, p. 75

[244] Doi, Abdur Rahman, *Shariah: The Islamic law*, London, 1984, pp. 218-226

[245] Bassiouni, 'Quesas Crimes' in *The Islamic Criminal Justice System* edited by M Cherif Bassiouni. pp. 203-209 at p. 203

2:217, Sura Imran 3:86-90, Sura Nisa 4:137, Sura Maida 5:54 and Sura Nahl 16:106-9. None of these verses mention any prescribed punishment for an apostate. It was developed by Sunna and exacted by the jurists.

Qisas includes intentional or unintentional Qatl or murder of various degrees and [Sura Nisa 4 : 93], Jurh or Qawad [Sura Maida 5:45] or grievous injury for punishing in the form of Qisas [Sura Baqara 2:178], i.e. retaliation or Diyat [Sura Baqara 2:178-9], i.e. compensation. Diyat is designated for blood money whereas Arash is designated for injuries.[246] The law of Qisas and Diyat is also termed as Jinaya.[247]

Tazkiya al Shuhud[248] must be conducted in Hudud and Qisas cases whether objection is raised by the defendant or not. In all other cases Tazkiya may be conducted.[249]

The Hudud and Qisas offences must satisfy certain criteria for Hadd and Qisas punishment to be applicable. Anything short of the criteria in procedure or form leads to Tazir punishment. Tazir may be inflicted in all instances where Hadd or Qisas cannot be enforced due to some legal impediment. This is preferred traditional Islamic law.[250] It is well known that the Hadd punishments prescribed in Sharia, may look very harsh on the surface but are difficult to prove. Standard of proof for awarding Hadd punishment is so high

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[246]El-Awa, Mohammad S., *Punishment in Islamic Law : A comparative Study*, Indianapolis, 1982, p. 71

[247]An-Naim, Abdullahi Ahmed, *Toward an Islamic Reformation Civil Liberties, Human Rights, and International Law*, New York, 1990, pp. 104-5, for details see pp. 101-136; for details on Qisas and Diyat see Ibn Duyan, *Manar al Sabil* translated into English as Crime and Punishment under Hanbali Law by George M. Baroody, Cairo, 1961, pp. 1-46

[248]see chapter 3 1.1

[249]Sanaullah v. The State PLD 1991 FSC 186 at p. 216

[250]Harington, 1805-1809, pp. 328-9

that the concept of Tazir is introduced in the penal system of the Sharia.[251]

The effect of motive is of no value in Hadd and Qisas offences, but the intention is. The Court can take into account both motive and intention in Tazir offences to determine the *quantum* of penalty.[252] Therefore the rule of Tazir could apply to cases settled as Diyat to determine the *quantum* of compensation. Oath shall not be demanded in Hadd punishment but it is a must in all cases liable to Tazir.[253] It would follow that oath is not demanded in Qisas punishment but could be demanded in Diyat.

An offence punishable with Hadd under Sharia could not be compromised or withdrawn or pardoned, even by the State, after it is brought to the Court for adjudication.[254] Prosecution cannot be withdrawn in a Qisas offence except by the heirs of the murdered or the injured victim. The ruler is authorised to withdraw from prosecution a Tazir case for public interest.[255] If death sentence is awarded by way of Hadd it is not pardonable by the Head of the Islamic State as it relates to Hudud. If death sentence as Qisas is awarded by Court under the law of Qisas and Diyat, the commutation of death sentence rests in the hand of the heirs of the deceased or the victim who suffered bodily injuries.[256] Before Diyat could be

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[251] Haji Khan and 2 others v. The State and others 1991 P Cr. L J 2110 at p. 2139 [FSC]

[252] Muhammad Ismail Qureshi v. Pakistan PLD 1991 FSC 10 at p. 29

[253] Muhammad Usman v. State PLD 1991 FSC 39 at pp. 48-9

[254] Ghulam Muhammad v. Mst. Murad Bakhta and 6 others PLD 1991 FSC 78 at p. 79; Habib ul Wahab Al Khairi and others v. Federation of Pakistan PLD 1991 FSC 236 at p. 266

[255] Habib ul Wahab Al Khairi and others v. Federation of Pakistan PLD 1991 FSC 236 at p. 266

[256] Habib ul Wahab Al Khairi and others v. Federation of Pakistan PLD 1991 FSC 236 at p. 257; Asif Ali Zardari v. The State 1992 P Cr. L J 171 at p. 177 [Karachi]

enforced all the Sharia heirs of the deceased must agree to forgive the accused.[257] An amnesty declared by the President of Pakistan on 7th December 1988 was challenged in a number of cases as unconstitutional and unIslamic. It was decided that persons who are not convicted under the law of Hudud, Qisas and Diyat, their sentences can be remitted.[258] The President and the provincial government has the authority to commute the sentence of death awarded in a Tazir offence for public interest.[259]

An accomplice may be pardoned in a Tazir offence to acquire evidence for the safe administration of justice. The same is not available in Qisas crime.[260] It should follow that the rule of Qisas should also be applicable to Hudud offences as the nature of the latter crimes are more serious in nature, from an Islamic perspective.

Since this thesis looks into the Hadd and Qisas offences for the purpose of exposing the procedure of proof and the law of evidence, it is thought suitable to leave the penal side of these offence and pay attention to the procedure of proof as mentioned in the enactments of Pakistan. The procedure to prove Hudud offences are different from the Tazir offences.[261] In awarding Hadd punishment, direct evidence from the required number of mature and truthful male

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257 Muhammad Pervaiz Akhtar v. The State 1986 P Cr. L J 1740 at p. 1742 [Lahore]

258 Hakim Khan and 3 others v. Government of Pakistan PLD 1992 SC 595 at p. 615; Mst. Sakina Bibi v. Federation of Pakistan PLD 1992 Lahore 99 at p. 123; Qadar Ali v. Superintendent, Central Jail, Harripur PLD 1994 Peshawar 35 at p. 36

259 Habib ul Wahab Al Khairi and others v. Federation of Pakistan PLD 1991 FSC 236 at p. 257; Asif Ali Zardari v. The State 1992 P Cr. L J 171 at p. 177 [Karachi]

260 Proviso to section 338 Code of Criminal Procedure, 1898 only applicable in Pakistan.

261 Lippman et al, 1988, pp. 35-57

witnesses of high probity must be satisfied, or the accused must confess. If the requirements of law are not satisfied Tazir will be applied instead of Hadd punishment if there exists sufficient ground for conviction.[262] The sentence of Qisas could be awarded by the testimony of two Adil (persons of integrity) male witnesses[263] or by the confession of the accused. If the accused demands, the testimony of the witnesses must be accompanied by oath. The accused can also take an oath to declare that the facts asserted by the witnesses are not correct. Generally at least one eye witness or the confession of the accused is required to prove Qisas crime.[264] Qisas crime proved by one witness can only be awarded Tazir punishment and not the sentence of Qisas.[265] The rules of witness testimony are more relaxed to prove Tazir offences. It is claimed that two male witnesses or one male and two female witnesses are required to prove Tazir.[266] It must follow that since Qisas crimes other than Qatl can be proved generally by one eye witness, Tazir crimes cannot logically stick rigidly to the principle of two witness testimony.

The following four Hudud laws were passed in 1979.

1. The Prohibition (Enforcement of Hadd) Order.[267] This Order has 33 articles and a schedule. It prohibits any trade of intoxicants and their display in any form whatsoever. Drinking of intoxicating liquor by an adult Muslim is punishable by Hadd. Any other kind of

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[262]Doi, 1984, pp. 218-226

[263]Muhammad Bashir v. The State 1992 P Cr. L J 597 at p. 603 [Shariat Court (AJK)]; Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 990 (Azad J&K); Muhammad Sadiq Khan v. The State 1980 P Cr. L J 11 at p. 14 [Azad J&K]

[264]Bassiouni, Dr. M. Cherif, 'Quesas Crimes' 1982 at p. 208

[265]Muhammad Bashir v. The State 1992 P Cr. L J 597 [Shariat Court (AJK)]

[266]*The Encyclopaedia of Islam*, Vol. IV, 1933, p. 710; Benmelha, Ghaouti, 'Tazir crimes' in *The Islamic Criminal Justice System* edited by M Cherif Bassiouni, London et al, 1982, pp. 211-225

[267]President's Order 4 of 1979

defiance of the law is punished by Tazir. Articles 6-11 are relevant for proving drinking of intoxicating liquor.

2. The Offences Against Property (Enforcement of Hudood) Ordinance.[268] It contains 26 articles. This law is meant to punish thieves, armed robbers and persons engaged in the theft of cattle etc. Article 7, the explanation to article 10, and article 11, 13 and 20 are related to the proof of crime.

3. The Offence of Zina (Enforcement of Hudood) Ordinance.[269] It has 22 articles and deals with adultery, fornication, rape, kidnapping, abducting etc. Articles 5-10 are relevant for proving cases under this Ordinance.

4. The Offence of Qazf (Enforcement of Hadd) Ordinance.[270] It has 20 articles. This Ordinance deals with Qazf or defamation both in the form of libel and slander only with regard to Zina and Zina bil jabr . Articles 3-10 are relevant to prove Qazf. Article 14 of this Ordinance has introduced the procedure of Lian. Lian is a charge of Zina preferred by the husband against his wife. This is done in front of the judge by taking an oath. The husband, on accusing his wife of Zina, takes the oath that the curse of God will be on him if he is lying. Similarly the wife then denies the allegation on oath that the curse of God will be on her if she is denying. In such case the Court will dissolve the marriage. If the husband refuses to take the oath he is guilty of Qazf. If the wife refuses to take the oath she is guilty of Zina.[271] The same is not available to the wife. The standard of proof is archaic based on morality of both the husband and the wife.

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[268]Ordinance VI of 1979

[269]Ordinance VII of 1979

[270]Ordinance VIII of 1979

[271]Doi, 1984, pp. 189-190 and 248-250; Mahomedullah, Al Haj, ibn S. Jung, *Anglo Muslim Law*, Allahabad, 1932, pp. 37-8; Mulla, Sir D. F. *Principles of*

For all the crimes described under these four Hudud laws, the proof required to execute the punishment of Hadd is primarily either through confession[272] of the accused or the testimony of at least two Muslim adult just male witnesses.[273] The proof required is higher in case of Zina and at least the testimony of four Muslim adult just male witnesses are required.[274]

If the case is decided by the confession of the accused, the retraction from confession by the accused before the execution of the Hadd shelves off the Hadd punishment,[275] although the accused can be punished by way of Tazir from the evidence on record. This rule do not apply to a Qazf case. In cases of Zina and Zina bil jabr the accused can retract from his/her confession even after the execution of the Hadd has started. Whatever is left of the Hadd shall be stopped immediately.[276] In such cases of retraction of confession by the accused the Court may order retrial of the case.[277]

The Court has to be satisfied as to the credibility of the witnesses where cases are solely proved by the testimony of the witnesses. [278] If the witnesses after deposing their statement retracts from the testimony before the execution of the Hadd thereby reducing the number of witnesses to less than the required number, the Court

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Mahomedan Law edited by M. Hidayatullah, 17th ed., Bombay, 1972, pp. 314-6

[272] Art. 9.a Order 4 of 1979; Art.7.a. Ord.VI of 1979; Art. 8.a. Ord. VII of 1979; Art. 6.a. Ord. of 1979

[273] Art 9.b Order of 1979; Art.7.b. Ord. VI of 1979; Art. 6.c. Ord. VIII of 1979

[274] Art. 8.b. Ord. VII of 1979

[275] Art. 10.1.a. Order 4 of 1979; Art. 11.1.a. Ord. VI of 1979; Art. 9.1.Ord. VII of 1979

[276] Art. 9.1. Ord. VII of 1979

[277] Art. 10.2. Order 4 of 1979; Art.11.2. Ord. VI of 1979; Art. 9.3. Ord. VII of 1979

[278] Art. 9.b. Order 4 of 1979; Art 7.b. Ord.VI of 1979; Art. 8.b. Ord.VII of 1979; Art. 6.b. Ord. VIII of 1979

may award Tazir on the proof of what is on the record.[279] In cases of Zina and Zina bil jabr the witnesses can retract from their testimony even after the execution of Hadd has started.[280] Such retraction puts a stop to the execution of Hadd any further but the Court may award Tazir on the basis of the evidence on record.[281] In a case of theft if the victim withdraws or says that he made a false statement or says that the witnesses or one of the witnesses deposed falsely the Court may punish Tazir on the proof on record.[282] In Zina or Zina bil jabr cases if the witnesses admit that they have sworn falsely this shall attract the provisions of the Qazf Ordinance.[283]

It is not clear whether a similar punishment is not awarded to a witness or a victim of a theft case where the victim admits that the witness swore falsely or that he made a false statement. It is also not clear whether or not the Court will punish a witness who retracts from his testimony in cases of Zina and Zina bil jabr. This is especially of importance where the Court, before taking the deposition of any witness satisfies itself of the credibility of the person of such witness, and also because of the severe punishment which could have been inflicted on a person innocently accused.

If an accused commits Qazf in the presence of the Court it will be proof by itself of liability for Hadd.[284] For all other crimes these provision is not applicable. This rule seems to be neither in conformity with the Islamic law of Hudud nor with the general law. A judge who has to decide a case should not himself become a witness

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[279] Art.11. Order 4 of 1979; Art. 11.3. Ord. VI of 1979; Art. 9.4. Ord. VII of 1979; Art. 9.2 Ord. VIII of 1979

[280] Art. 9.2 Ord. VII of 1979

[281] Art. 9.4 Ord. VII of 1979

[282] Art. 11.3 Ord. VI of 1979

[283] Art. 6.a and 7 Ord. VIII of 1979

[284] Art. 6.b and 7 Ord.VIII of 1979

therein by making statement on oath before a Court of law and thus should not fill gaps left by the prosecution[285] Even if it is considered that the Court is full of people, still the question of proving the credibility of a witness remains. The words 'in the presence of the Court' is bothering. Though the judge could be a credible witness, he could not be a judge and a witness at the same time in Hudud cases under all schools of Islamic law except the Zahiris.[286] What if, in the Court, the judge, the accused and a few other women are present. Will the Qazf by the accused, as per Qazf Ordinance, be liable to Hadd? The rule seems to be an application of Takhayyur by the Islamic scholars of Pakistan borrowing from the Zahiri school of thought.

The Hudud Ordinances, especially the Zina Ordinance have infuriated the women of Pakistan. There has been a continuous controversy from the date of its inception both in the intellectual and political level.[287] The case of Rashida Patel vs. Federation of Pakistan[288] challenging the constitutionality of the Hudud Ordinances reflects the agitated mind of the women in Pakistan, and their awareness as to the equal rights guaranteed by the Constitution.[289]

In 1992 The Criminal Law (Third Amendment) Ordinance (X of 1992) substituted a number of sections in the Penal Code of 1860. The Qisas and Diyat laws of 1992 is the result of the proposed law drafted by the Council of Islamic Ideology in 1980. A series of amendments have

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[285] Muhammad Azam v. Muhammad Iqbal PLD 1984 SC 95 at pp. 122. 127,130, 131, 132 and 141

[286] El-Awa, 1982, p. 129

[287] *Viewpoint*, February 18, 1979, p. 3; March 24, 1983, pp. 27-29 ; March 31, 1983, pp. 27-29; April 14, 1983, pp. 29-30, July 25, 1991, p. 34, March 12, 1992, p. 6, etc.

[288] PLD 1989 FSC 95; see chapter 6 for observations on this case

[289] Article 25(2) of the Constitution of the Islamic Republic of Pakistan guarantees equal rights to both men and women.

taken place in the Criminal law from 1990.[290] The new section 304 of the Penal Code lays down that the proof for intentional killing and hurt shall be either by the voluntary and true confession of the accused made before a Court competent to try the offence, or by the evidence provided by article 17 of the Qanun-e-Shahadat. Article 17 as discussed above expressly says that except for Hudud and financial obligations the Court may accept or act on the testimony of one man or one woman or circumstantial evidence. Yet it also says that the competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunction of Islam as laid down in the Holy Qur'an and the Sunna.[291] This phrase may in future give rise to discourse over the number of witnesses required to prove Qisas offences.

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[290] for example see, The Criminal Law (Amendment) Ordinance, 1990 [IV of 1990] and The Criminal Law (Third Amendment) Ordinance, 1990 [VIII of 1990] was repealed by article 8 of The Criminal Law (Fifth Amendment) Ordinance, 1990; The Criminal Law (Second Amendment) Ordinance, 1990 [VII of 1990] and The Criminal Law (Fifth Amendment) Ordinance, 1990 [XV of 1990] was repealed by article 14 of The Criminal Law (Amendment) Ordinance, 1991[I of 1991]; The Criminal Law (Amendment) Ordinance [I of 1991] was repealed by article 17 of The Criminal Law (Second Amendment) Ordinance, 1991 [XVIII of 1991]; The Criminal Law (Second Amendment) Ordinance, 1991 [XVIII of 1991] was repealed by article 18 of The Criminal Law (Fourth Amendment) Ordinance, 1991 [Ordinance XXX of 1991]; The Criminal Law (Fourth Amendment) Ordinance, 1991 [Ordinance XXX of 1991] was repealed by article 18 of the Criminal Law (Sixth Amendment) Ordinance, 1991 [Ordinance XLII of 1991]; The Criminal Law (Fourth Amendment) Ordinance, 1991 was repealed by article 18 of the Criminal Law (Amendment) Ordinance, 1992 [IV of 1992]; The Criminal Law (Amendment) Ordinance, 1992 [IV of 1992] was repealed by article 18 of The Criminal Law (Third Amendment) Ordinance, 1992 [Ordinance X of 1992]; The Criminal Law (Second Amendment) Ordinance, 1992 [Ordinance VI of 1992] was repealed by article 5 of The Criminal Law (Fourth Amendment) Ordinance, 1992 [Ordinance XI of 1992] ; The Criminal Law (Second Amendment) Ordinance, 1990 [Ordinance VII of 1990] was never placed before the National Assembly for which it expired on 4th January, 1991; also see, Ikram, Justice Mian Qurban Sadiq, 'Law of Qisas and Diyat and its application' in *All Pakistan Legal Decisions*, 1991, Vol. 43, No. 2, pp. 87-102, 102-103 and 125.

[291] Muhammad Nadeem v. The State 1992 P Cr. L J 1520 at p. 1533 [Supreme Appellate Court]

2.3.2.1 Non-Muslims

There seems to be a disagreement among Muslim scholars as to the Hadd punishment that can be inflicted on a non-Muslim.[292] It is mentioned in the Prohibition (Enforcement of Hadd) Order, 1979 that the non-Muslims will be punished with Tazir only. It is not clear from other Hudud laws whether it implies therefore that the non-Muslim will not attract the punishment of Hadd if any crime committed by them had to fall under any of the categories of Hudud laws.

In early Muslim state non-Muslims were not liable under Hudud punishment for drinking wine.[293] This rule is followed in Pakistan in a restricted manner. A non-Muslim citizen of Pakistan is allowed to drink intoxicating liquor in a ceremony prescribed by his religion[294] and a non-Muslim non citizen of Pakistan is only allowed to drink at a residential place in private.[295]

In all cases if the accused is a non-Muslim, the witnesses could be non-Muslims.[296] It is not clear how this rule will operate when a group of Muslims and non-Muslims together commit gang theft, robbery, Zina, Zina bil jabr or any other crimes mentioned in these laws. What would be the standard of proof if in a Zina case one is a Muslim and the other is a non-Muslim.

The definition of Muhsan in Zina and Qazf Ordinances have made the condition much worse. Muhsan is defined in terms of Muslims but

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[292] Al-Azhari, Md. Alauddin, *The Theory and Sources of Islamic Law for Non-Muslims*, Dacca, 1962, pp. 62-8

[293] Pearl, David, 'Historical Background to the 'Personal System' of Law' in *Studies in Islam*, Jan-Apr, 1974, Vol. XI, No. 1-2, pp. 95-120 at p. 115

[294] Art. 11. b. Ord. VI of 1979

[295] Art. 11. c. Ord. VI of 1979

[296] Art.7.b. Ord VI of 1979; Art. 8.b. Ord. VII of 1979; Art. 6.c. Ord. VIII of 1979

the law is applicable to non-Muslims as well. If that was the intention of the Ordinances this should have been clarified.

By the wording of the Hudud laws it is clear that the testimony of Muslim witnesses will be admissible against a Muslim as well as a non-Muslim accused. On the other hand the testimony of non-Muslim witnesses is applicable against non-Muslim accused only. The position of mixed cases is evidently not clear. In the Ordinances it is not mentioned whether the non-Muslims should be male. Presumably it is intended to be so, but that is also not clear. Distinction has not been drawn as to the different religious or tribal groups. They have all been termed as non-Muslims.

It is important to note that dissolution of marriage of Christians are based on fault theory subjecting the party wishing a dissolution of marriage to find fault with the other.[297] Therefore, the Christians in Pakistan are placed in an impossible situation. According to Divorce Act, 1869, Christians have to prove adultery in order to be granted divorce. Each divorce litigation can either end up either by the imprisonment of the wife or the husband under the Zina Ordinance.[298]

2.4 Conclusion

The brief survey of Islamic law of evidence in Muslim India proves that there was a well defined system of laws in the Indian subcontinent before the advent of the British. The Hindu law and other customary law also prevailed. In practice the Islamic law was much more suited to the need of the society than it reflects in

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[297] Siddiqua, 1989, p. 104

[298] Jahangir, Asma and Hina Jilani, *The Hudud Ordinances A Divine Sanction?* Lahore, 1990, p. 108

theory. Initially the British did not desire to change the existing law of the country. The Regulations and Acts only reflect the understanding of the existing law by the British administration. There were undoubtedly two groups of people, one that favoured the introduction of English law in the Indian subcontinent and the other who thought it to be impracticable. The former group belonged to the Crown and perhaps to the Company as well. The latter group belonged only to the Company. It is probably at a later period that there was a reconciliation between the two groups in the Company. A kind of check and balance was introduced. When one group wished to see English law prevalent, the other group put a check for reviewing the same, as happened with the Evidence Bill. Yet, for the satisfaction of all concerned, the focus was always laid verbally on the English law. It is also possible that in the process of check and balance a certain portion of English law may have been introduced. It is well proved that until 1872 the Islamic law of evidence largely prevailed in the Indian subcontinent along with the Hindu and customary law. The Islamic law as practised in India was not purely inquisitorial in nature, neither the law of Pakistan and Bangladesh at present is purely adversarial in nature. It is a combination of both the system. There is a possibility that English law might have been introduced after 1872 within the existing system of the law of evidence. It is possible that to cleanse the Evidence Act of those particular aspects of English law Islamisation of the law of evidence was felt necessary. It is also possible that a reassertion and reminder of the Islamic nature of the country was necessary by introducing Islamic law of evidence. These possibilities has to be checked and weighed against particular aspects of law of evidence. A humble attempt is made in this thesis to look at a section

of witness testimony. The re-introduction of the Islamic law of evidence in Qanun-e-Shahadat and Hudud Ordinances in Pakistan seems to have given rise to serious discourse regarding the nature of Sharia law. The changes regarding sub female witness testimony have started the debate on the social status of women. Women of Pakistan are infuriated as article 17 of the Qanun-e-Shahadat and the Hudud laws reflect on the mental immaturity of women and as such relegating them to the rear of the society. The challenge posed by the case of Rashida Patel vs. The Federation of Pakistan against the Hudud Ordinances for sub female witness testimony reflects the agitated mind of the educated womens' group. The non-Muslims, it seems, have not yet challenged any of provisions of the Islamic laws. In the following chapters a few aspects of the witness testimony introduced in Pakistan, as mentioned above, will be examined to arrive at a comprehensive understanding of the changes and their effect on case law. The four Hudud laws seem to have been very badly drafted. They suffer from ambiguity and the message is not clear. The following chapter examines the qualification and competence of different kinds of witness testimony, especially the integrity of a witness in the framework of interested witnesses.

CHAPTER 3

3. Qualifications of a Witness

Article 3 of the Qanun-e-Shahadat,1984 and the Hudud Ordinances in 1979 in Pakistan claimed to have introduced the Islamic law relating to the qualification and competence of a witness. In this chapter, qualification and competence are discussed in relation to the characteristics of a witness as assigned by the Court and the statute. It seems that article 3 of the Qanun-e-Shahadat could change very little the existing law of Pakistan that has evolved through case law. The case law in Pakistan and Bangladesh is not inconsistent with the Islamic law regarding witness testimony. The changes concerning the competence of a witness in criminal cases, brought by the introduction of Hudud laws have been nullified, since in fact Courts decide cases within the category of Tazir offences.[1]

It was felt while writing this chapter that the issue of witness testimony in general has not been dealt with in any detail by a single case law in Pakistan or Bangladesh within the period seen for this thesis, except for competency of witness in Islamic law and Tazkiya al Shuhud. The materials are scattered, largely fragmentary and scanty. An effort has been made to collect the scattered material to analyse the issue of witness testimony.

No materials could be found in which the law makers addressed the competence of witness testimony in terms of human perception, risk of error involved in testimony, unknown subjective influence or justice.

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[1] see chapter 2.3.2

Qualification is a quality ascribed to make a witness competent. Witness means a person who has knowledge of facts relevant to the case, and for criminal cases whose depositions have been recorded by the police during investigation.[2] A competent witness, as required by law, would likely be credible. The term credibility can be divided into two components, i. eye witness ability, i.e. the cognitive side of the credibility and ii. eye witness willingness to tell the truth, i.e. the motivational side of credibility.[3] The two components are stated together in Mizan's case that the credibility of a witness depends upon his knowledge of the fact to which he testifies, his lack of interest, his integrity and his veracity.[4]

The concept of qualification and competence in the legal system of Pakistan and Bangladesh are little different from those same concepts in the theoretical Islamic legal system. Qualification of a witness in Pakistan and Bangladesh is comprised in three closely related concepts --- the competence, compellability and privilege of a witness. A witness is competent if he may lawfully be called to give evidence, i.e. that is legal ability to give evidence. A witness is compellable if he can lawfully be obliged to give evidence, i.e. legal obligation to give evidence.[5] If a compellable witness refuses to testify he may be sent to prison.[6] If necessary, coercive measures can be taken to ensure the appearance of a witness.[7] In a strictly

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[2] Nasrullah v. The State 1980 P Cr. L J. 5 at p. 10 [Lahore]

[3] Undeutsch, Udo, 'Statement Reality Analysis' in *Reconstructing the Past* edited by Arne Trankell, Deventer, 1982, pp. 39-71 at pp. 39-40

[4] The State v. Mizanul Islam Khan alias Dablu and another 40 DLR 1988 AD 58 at pp. 70-1

[5] Seabrooke, Stephen, *Evidence in a Nutshell*, London, 1981, p. 6

[6] Sections 68-93C and 171 of the Code of Criminal Procedure, 1898 are applicable both in Pakistan and Bangladesh.

[7] Ghulam Farid v. The State and others 1983 P Cr. L J 777 at pp. 777-8 [Lahore]

limited number of situations, a witness who is both competent and compellable may refuse to answer certain questions, relying on a privilege conferred upon him by law.[8] Broadly, the term witness must be taken to include parties to the proceedings, but there are exceptions to this.[9]

In Islamic law, if a witness is competent by Islamic standards s/he is qualified to testify in a case. Compellability is a moralistic issue.[10] It seems witnesses were compelled during the Abbasid period.[11] Privilege as such is not known. Both privilege and compellability can be derived by analogy for public purpose (Maslaha).

3.1 Competence of a Witness

A person is said to be competent to testify, or a competent witness, when he is allowed by law to give evidence on a trial or other judicial enquiry. The question of a witness's competency may arise in reference to his absolute competency, i.e. ability to give evidence generally, or relative competency, i.e. with reference to a particular fact or inquiry.[12] Persons are usually summoned for relative competency. The rule or test for competency is whether the person has sufficient capacity to observe, recollect, and to communicate the subject of testimony. The requisite capacity to communicate includes

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[8] see Arts. 4-14 of Qanun-e-Shahadat and Ss. 121-132 of the Evidence Act.

9Cross, 1985, pp. 191-4; Sarkar, M.C., and S. C. Sarkar *The Law of Evidence in India*, 4th ed., Calcutta 1929, p. 845

[10] Ibrahim, Omar A., *Proof in Islamic Law with special reference to the Sudan*, Ph. D. Thesis, London University, 1986, p. 333

[11] see chapter 2.1.4

[12] Jowitt, Earl and Clifford Walsh, Jowitt's *Dictionary of English law* edited by John Burke, Vol. I, 2nd ed., London, 1977, p. 403

the ability to understand and answer intelligently the questions of counsel, as well as a sense of moral responsibility to tell the truth.[13] The competency of a witness in Islamic law is comprised in Tahammul al-shahada and Ada al-shahada. The conditions for Tahammul al-shahada are sanity, eyesight, and witnessing the subject matter, except in hearsay evidence. The conditions for Ada al-shahada are adulthood, sanity, eyesight, faculty of speech, truthfulness and Muslim.[14] Tahammul al-shahada means bearing testimony and Ada al-shahada means an obligation to testify. It would follow that technically Tahammul al-shahada is similar to competency of a witness whereas Ada al-shahada is similar to compellability. As compellability of a witness is not known in Islamic law it could be described in terms of personal obligation that a Muslim has towards the society. Therefore an independent truthful adult Muslim is competent to be a witness in Islamic law[15] and may be under an obligation to testify. There are classes of persons who are, partially or wholly, not accepted as witnesses, subject to certain conditions and circumstances. They are persons interested in the outcome of the proceedings,[16] convicts,[17] female witnesses[18] and non-Muslims.[19]

13Manning, Morris and Alan W. Mewett, 'Psychiatric Evidence' in *The Criminal Law Quarterly*, 1975-76, Vol. 18, pp. 325-354 at p. 327; Yarmey, A. Daniel, *The Psychology of Eyewitness Testimony*, New York et al, 1979, pp. 2-3

14Haider Hussain v. Government of Pakistan PLD 1991 FSC 139 at p. 157

15*Hedaya*, 1791, Vol. II, pp. 668-671

16*Hedaya*, 1791, Vol. II, pp. 685-687; *al Risala fi Usul al Fiqh* of Al Imam Muhammad ibn Idris al Shafei, Treatise on the foundation of Islamic Jurisprudence translated by Majid Khadduri, Baltimore, 1961, pp. 245-248

17*Hedaya*, 1791, Vol. II, pp. 683-4 and 688

18*Hedaya*, 1791, Vol. II, pp. 667-671; *al Risala*, 1961, pp. 247-8

19see chapters 2.1.2 and 2.3.2.1

According to article 3 of the Qanun-e-Shahadat,[20] understanding and prudence are the guiding factors for a person to be competent to be a witness, provided he has not been convicted for perjury or slander.[21] Such convicted person will not be a competent witness until the Court is satisfied that he has repented and mended his ways. However the Court will admit the testimony of a less competent witness where no witness with the qualifications prescribed by the injunctions of Islam is forthcoming.[22] According to the Shafei school of thought repentance restores competency to a witness.[23] It was decided in Muhammad Dawood v. The State[24] that the emphasis is upon deciding the controversy after examining the available witnesses, because the rights of people cannot be allowed to be lost merely because of non-availability of those persons who do come up to the high standards set in Islam. The Judge observed in that ruling that there had been a general decadence in the conduct and characters of the people as a whole as compared to the early Islamic period. Hence the provision for examining the available witnesses, in the absence of competent witnesses according to Islamic injunctions, is an expedient provision. It seems that the Judge, supposedly following the Hanafi school of thought, has exercised the

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20Order 10 of 1984, section 83 of Evidence Enactment of the Syariah Court, 1991, Enactment No. 2 of 1991, of Kelantan State of Malaysia explicitly makes difference between shahada and bayyina in giving testimony. Shahada follows more strict rules than bayyina. Therefore a person of bad character is permitted to give bayyina but not shahada. Shahada has a quality of truth in it whereas bayyina may lack in that (section 3)

21Zulfiqar Ali and 2 others v. The State 1992 P Cr. L J 2130 at p. 2136 [Lahore]; Noorul Islam v. The State 1986 P Cr. L J 1818 at p. 1820[Karachi]

22Article 3, Qanun-e-Shahadat; Adnan Bashir v. The State PLD 1986 FSC 252 at p. 255 ; Muhammad Dawood v. The State PLD 1985 Karachi 730 at p. 740

23*Hedaya*, 1791, Vol. II, p. 684

24Muhammad Dawood v. The State PLD 1985 Karachi 730 at p. 740; The reiteration is made in Sanaullah v. The State PLD 1991 FSC 139 at p. 215

law of Takhayyur, i.e. a rule from Shafei school of thought, without expressly stating that. Takhayyur is chosing a rule from any other school of thought.

The competency of a witness as laid down in section 118 of the Evidence Act[25] is based on understanding and prudence only, and it does not go beyond that. Therefore a lunatic of lucid intervals is considered as a competent witness when he is not suffering from the illness.[26]

Qanun-e-Shahadat has taken the practical approach of Islamic law. Article 3 first of all has restricted the testimony of a person who is convicted of slander and perjury only. With repentance the right of testimony is restored. Secondly, even without any credible witness as set by Islamic law, any other witness is considered to be competent.

The Evidence Act does not mention probity, but the Penal Code,1860, makes false statements punishable.[27] It is the Courts that indulge in the discussion of truthfulness in the general case laws of Pakistan and Bangladesh. It will be seen in the following paragraphs that probity differs from case to case and probity is related to the fact, and not to the integrity of the person. The two issues are discussed as integrity of a witness and credibility of a witness. Integrity of a person ensures his version as true due to his morality, whereas in credibility it is the judge's duty to find out the truth by weighing the probative value of the statement.

In Islamic law probity and understanding are considered to be the main factors for a competent witness. In theory a convict and a non-Muslim may therefore be considered as incompetent for lack of

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25Act I of 1872
26S.118, Evidence Act
27Chapter XI of Penal Code 1860.

probity. It seems a convicted person and a non-Muslim denies the truth of the faith by not following the duties prescribed by the religion. A convicted person restores his right to testimony in most of the cases as soon as he has repented. A non-Muslim is considered a competent witness in the absence of Muslims and in non-Muslim matters for practical purposes.[28] The reason for excluding a person interested in the outcome of the proceedings is self evident. A female witness may be honest but she is considered to be intellectually immature. It seems that for practical reasons she is allowed to be a witness with much restriction in all matters except Hudud offences. The same reason perhaps would apply to a child, or a deaf, dumb and blind witness giving them limited rights of testimony.

3.1.1 Integrity of a Witness

Integrity literally means rectitude, i.e. conformity to truth and justice. Integrity of a witness connotes the rectitude of a person to reach that end with all morality. The Sharia has built-in safeguards against witnesses who would tend to commit perjury.[29] The probity of a witness is indispensable in Islamic law, as mentioned in the Hedaya, because it induces a probability of truth. Imam Abu Hanifa has said that the Qadi ought to rest contented with the apparent probity of a Muslim. It is generally necessary to rest satisfied with the probability that all that profess the religion of Islam abstain from what is prohibited, as the attainment of certainty is impracticable. In cases inducing retaliation or punishment mere probability is not sufficient and therefore an examination of the

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[28] see chapters 2.1.2 and 2.3.2.1

[29] Baroody, George M. 'Shari'ah Law.....' 1962 at p. 30

character of the witnesses must be made. For punishment and retaliation are cases in which all possible pretexts of prevention are to be sought. It is requisite in such cases to investigate the character of the witness strictly, as doubt is preventative in these instances. The first important aspect to verify a piece of information would be to find out the credibility and the piety of the witnesses, as had been done regarding the Traditions of the Prophet. There is also the consensus of Imam Abu Hanifa and other jurists that if a party to the case assails the credibility of a witness, then Tazkiya al Shuhud is necessary in every case; otherwise, it is necessary only in Hudud and Qisas cases, whether the party objects to it or not.[30] Tazkiya means information, it does not mean Shahadat.[31] Tazkiya or examination of the character of witnesses is an enquiry conducted either by the Qazi himself or through the Muzakki, (one who examines the character of a witness) primarily to ascertain if the witnesses are Adil. It is in fact a probe into the character and the general reputation of the witnesses. It is no substitute for the cross examination.[32] Therefore technically Tazkiya al Shuhud would be examination of character for making information available for the judge. Tazkiya is only necessary against the alleged eye witnesses[33] and not to secondary witnesses.[34]

The rule for examination of the character of a witness, Tazkiya al Shuhud appears in the Hudud Ordinances.[35] The examination of the

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30*Hedaya*, 1791, Vol. II, p. 672; Mst Rubi Akhtar v. The State and another 1992 P Cr. L J 2403 at p. 2416 [FSC]

31Sanaullah v. The State PLD 1991 FSC 186 at p. 225

32Abdul Majeed v. The State 1983 P Cr. L J 1873 at p. 1879 [Azad J & K]

33Ali Ahmad and another v. The State 1985 P Cr. L J 1382 at p. 1385 [FSC]

34Muhammad Sadiq Khan v. The State 1980 P. Cr. L J 11 at p. 15 [Azad J & K]

35Ordinance VI of 1979, Art 7b; Ord. VII of 1979, Art 8b; Ord, VIII of 1979 Art 6c; Order 4 of 1979 Art. 9b. see chapter 2; The Enactment No. 2 of 1991

character could be done both openly or secretly by the Qadi, by asking a Muzakki, to enquire into the character of the witnesses.[36] The philosophy behind the secret examination of character is that persons acquainted with the character of the witnesses may be hesitant to depose against them in public; thus it may be difficult to conduct examination of character satisfactorily as enjoined under Muslim law. Now a days, it is more difficult to persuade pious persons of impartial integrity to express opinion about the character of the witnesses openly and run the risk of earning displeasure of the witnesses.[37] In Mumtaz Ahmad v. State a bank robbery case considered as Haraba, a detailed rule on Tazkiya al Shuhud is discussed as *obiter dicta*. One of the rules is that the Tazkiya al Shuhud may be undertaken at least in the criminal cases at the end of the evidence. The reason may be that if the evidence brought is defective on other grounds, the need to undertake the exercise may not arise at all and so the Court can save time. However, if evidence in all other respects maintains the standard, only then should the Court resort to it. Similarly, it can be done even at the appellate stage or by remanding a case if the facts and circumstances of the case so warrant.[38]

The same rule was earlier discussed in Salamullah v. The State, a theft case. It was held that the condition for Tazkiya al Shuhud cannot possibly be fulfilled before the trial is concluded, because the test of credibility of witnesses will have to be related to the evidence that is given in Court. There are otherwise no means by which the

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of Kelantan State in Malaysia, sections 119-129, has more detailed rules than Hudud Ordinances of Pakistan.

36*Hedaya*, 1791, Vol. II, pp. 672-3

37Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 991 [Azad J&K]

38Mumtaz Ahmad v. State PLD 1990 FSC 38 at p. 49

Court can possibly arrive at the conclusion that the witnesses satisfy the test of credibility.[39] Here it seems that the Court has adhered to the view of the general law, that the test of credibility of a witness will be related to the evidence that is given in Court rather than his personal integrity.

The other rules on Tazkiya al Shuhud laid down by the Federal Shariat Court in Mumtaz Ahmad's case in 1990 are that the generally accepted view in Islamic law is that Muzakki should be more than one. The qualifications of a Muzakki as laid down by Islamic jurists are that he should be a sane adult person with ability to undertake a critical inquiry about the antecedents of a person in order to find out his credibility and piety. He should be a self sufficient person and not greedy and avaricious. He should be well educated, God-fearing, honest and of good character.[40] It seems that most of the essentials required for a Muzakki are similar to a witness of very high moral standard. If the credibility of such a witness can be questioned in Hudud cases it is difficult to imagine how a person of the same standard would inquire into the examination of the character of the witnesses. Most probably for that reason, more than one Muzakki is insisted upon.

It was also pointed out in the same case that a Hadd sentence can only be avoided for just cause and good reasons but it cannot be evaded by the procedural interference of Muzakkis to save a culprit from the sentence, if one is otherwise due.[41]

The Federal Shariat Court in 1990 summarised the Islamic law relating to the proof of theft mentioned in section 7 of Hudud

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39 Salamullah v. The State PLD 1984 Karachi 73 at p. 75
40 Mumtaz Ahmad v. State PLD 1990 FSC 38 at p. 50
41 Mumtaz Ahmad v. State PLD 1990 FSC 38 at p. 49

Ordinance VII of 1979. The relevant Islamic law as discussed by the Shariat Appellate Bench of the Supreme Court of Pakistan in the case of Ghulam Ali v. State,[42] is as follows:

there must be evidence of victim followed by at least two witnesses;

in case of discrepancies on vital aspects between two witnesses both shall be rejected;

Tazkiya al Shuhud is a condition precedent to impose the sentence of Hadd;

there should be one or more Muzakki;

the Muzakki should be present when the witness gives evidence;

the Muzakki should also be questioned about antecedents, character and dealings;

it is the responsibility of the Court to satisfy itself about the credibility of a witness and it can for that matter select open or secret modes of inquiry or both;

the Court may frame a questionnaire on which the Muzakki should collect information to supply to the Court;

the Court should also examine the Muzakki after he submits his report;

the Court should put critical questions to the witness and cross examine him, to discover facts that might show his credibility, piety or otherwise. [43]

One could argue with certainty in Islamic law that the above decision would also be applicable to the other three Hudud Ordinances except that in a Zina case evidence of four witnesses must be present instead of two.[44]

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[42]Ghulam Ali v. State PLD 1986 SC 741 at p. 754

[43]Mumtaz Ahmad v. State PLD 1990 FSC 47 at pp. 50-1

[44]See chapter 2.3.2

In Naseer Hussain v. The State,[45] it was held that the trial Court and not the investigating agency is empowered to test the credibility of the alleged eye witness who claims to have seen the commission of a Hadd crime. The Court held that the mere assertions of the four witnesses as required in a Zina case would not make a *prima facie* case against the accused persons.

It would follow from this that (i) a trial Court could be equated with a Muzakki, (ii) if a trial Court did not believe a witness in a Hadd case possibly the superior Courts will not interfere with the decision as it would create doubt in the case and (iii) in Hadd offences mention of the required eye witnesses by itself will or should not attract Hadd punishment. It appears that rule (ii), will not apply to a Tazir case as in a double murder case the Supreme Court of Pakistan held that a High Court would have power to accept as reliable the testimony of a witness whom the trial Court did not believe or brought under doubt.[46] Had the Supreme Court considered the murder case even as Qisas then rule (ii) would have applied. This decision of Naseer Hussain is prior to the decision of the Federal Court decision in 1986 and its reasserting in 1990. It is not clear whether rule (i) will have any persuasive force in the presence of the Federal Shariat Court decisions. That is whether the Court and independent persons can act as Muzakki side by side.[47]

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45 Naseer Hussain v. The State PLD 1984 Lahore 67 at p. 68

46 Riasat Ali and another v. The State PLD 1991 SC 397 at p. 399

47 Article 203D of the Constitution of the Islamic Republic of Pakistan enables a Shariat Court to examine and decide whether or not any law or provision of law is repugnant to Islam. Article 203DD enables a Shariat Court to satisfy itself as to the correctness, legality or propriety of any finding etc. Article 203 GG binds the decision of the Shariat Court on the High Court and other sub ordinate Courts. If the Shariat Court decides that a law is repugnant to Islam article 203D(3) directs for the amendment of such law so as to conform it with the injunctions of Islam.

The Shariat Appellate Bench in Ghulam Ali v. State also discussed the necessity of Muzakkis as no one who has deposed or who has come to depose for the prosecution in a case of Hadd would willingly disclose that he has some defects of character or that he is not a truthful person. It is therefore necessary to put critical questions to him and cross examine him to discover if he wants to conceal material facts from the Court.[48] It appears that the whole range of discussion of Muzakkis is more related to the issue of Hadd than other offences. It is to prove a case beyond reasonable doubt so as not to punish an innocent person. This institution is very important in Islamic law, given the simple way of proving fact by direct testimony.

The Qanun-e-Shahadat and the Evidence Act do not have any proposition similar to the Hudud Ordinance or general Islamic law relating to the examination of the integrity of a witness. A negative approach is provided in the general law of the Penal Code, 1860 to punish the witness for giving false evidence.[49] Moreover both the Qanun-e-Shahadat and the Evidence Act allow the impeachment of the veracity of a witness in cross examination if it is related to the issue in dispute.[50] The consequences would be severe leading to punishment for giving false evidence if the letters of the Qanun-e-Shahadat and the Evidence Act are strictly applied.

In some form the fact that the character of a witness is important for arriving at the probity of a fact is retained by the codified law.[51] A different concept of witnesses to character than Muzakki appears in section 140 of the Evidence Act and article 135 of the Qanun-e-

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48Ghulam Ali v. State PLD 1986 SC 741 at p. 755

49Chapter XI of Penal Code,1860

50see chapter 5.1; Ss. 146 and 132 of the Evidence Act and Arts. 141 and 15 of the Qanun-e-Shahadat.

51see for details chapter 7.1

Shahadat. A witness to character can impeach the veracity of a witness. S/he can be cross examined and re-examined. This is also required of a Muzakki. It is nowhere mentioned in the Evidence Act or the Qanun-e-Shahadat that the witnesses to character should have a high moral standard. The role of a Muzakki works as a deterrent to impose Hadd punishment. His investigation to the character of witnesses is necessary before imposing Hadd punishment. A witness to character is only called to depose where character is in issue. It is not for deterring capital punishment. A witness to character may be called where a person is accused of rape to prove that the woman was of bad moral character according to section 155(4) of the Evidence Act and article 151(4) of the Qanun-e-Shahadat, whether the character of the victim is in issue or not.[52] The Muzakki does not have a similar role. It may be mentioned that whatever may be the probative aspect of character testimony, it may create prejudicial dispositions in the mind of the people including the judge present in the Court. [53]

It was discussed as *obiter dicta* in a double murder case by the Supreme Court of Pakistan in 1985 that according to Islamic Jurisprudence, when a witness has been found to have given false testimony concerning one accused in a case the credibility of such witnesses regarding involvement of another accused in the same occurrence would be irretrievably shaken.[54]

In contrast it was held by the Federal Shariat Court that if the testimony shows that either the witness is suppressing the facts or

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[52]see chapter 6.2.2

[53]Kaplan, Martin F, 'Character Testimony' in *The Psychology of Evidence and Trial Procedure* edited by Saul M. Kassin and Lawrence S. Wrightsman, California et al, 1985, pp. 150-174 at p. 168

[54]Ghulam Sikandar v. State PLD 1985 SC 11 at p. 23

knows nothing, no reliance can be placed on the testimony of such a witness.[55] The Shariat Appellate Bench of the Supreme Court of Pakistan ruled that if the witnesses contradict in material particulars in their statement, they cannot be believed. The minor contradictions do not affect the testimony.[56]

The advantage or disadvantage of the Islamic law for awarding Hudud and Qisas punishment is the requirement of very high degree of probability of proof beyond reasonable doubt as a pre-requisite to establish the crime. The result is to ensure more errors in the findings of fact than would exist were the requirements a preponderance of probabilities.[57] Even when the brother is the complainant in the case or he has any chance to inherit from the deceased (murdered person), he does not remain a competent witness for the purpose of awarding punishment of Qisas or Hadd.[58] Under Islamic law the evidence of a brother of a murdered person is not admissible in evidence against an accused person for Qisas.[59] The reason is that the brother is considered to have interest in the outcome of the proceedings. He therefore might say something which may affect the truthfulness of his statement. It therefore shows that by excluding the relatives from becoming witnesses in major offences, Islamic law takes precautions against the credibility of a witness rather than the integrity of his character.

In Hadd offences, eye witness does not only mean witnessing a fact but witnessing fact in the given condition for constituting Hadd

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55 Parvez Iqbal v. The State PLD 1985 FSC 134 at p. 137; *al Risala*, 1961, p. 245

56 Said Muhammad v. State PLD 1990 SC (Sh. App. B.) 1176 at p. 1182

57 Weinstein. Jack B., 'Some Difficulties in Devising Rules for Determining Truth in Judicial Trials' in *Evidence and Proof* edited by William Twining and Alex Stein, Aldershot et al, 1992, pp. 321-344 at p. 334

58 Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 990 [Azad J&K]

59 Muhammad Rashid Khan v. The State 1984 P Cr. L J 93 at p. 99 [Azad J&K]

offence, e.g. in theft case witnessing that a thing is stolen from custody or Hirz. If later on the accused are seen taking away some property it will only attract Tazir punishment.[60]

3.1.2 Credibility of a Witness

Credibility means discrepancy between the facts and a version of them presented as true. Credibility includes honesty and the capacity for testifying. It requires determination of the extent to which the witness has the capacity to observe, recollect and communicate truthfully and intelligently.[61] Credibility of a witness as understood by the general Courts is more to do with the cognitive and motivational credibility than integrity in the sense of Islamic law applicable to law of Hadd and Qisas. It seems that the Courts spend more time on discussing motivational credibility of a witness than his cognitive credibility. Often the witnesses are the inmates of the house or a neighbour. Because of the nature of relationship there is a probability of preponderance of interest of the witnesses in the outcome of the case. For this reason the Courts are cautious to evaluate the probative value of a witness statement in terms of motivational credibility.[62] It is to be noted that some of the terms that appear in discussing the credibility of a witness in this chapter are defined and explained in the following chapter. For example, independent, natural, interested, chance, partisan witnesses, etc.

The credibility of a witness depends upon his knowledge of the fact to which he testifies, his disinterestedness, his integrity, his veracity and his being bound to speak the truth by such an oath as

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[60] Arbab v. The State 1985 P Cr. L J 1462 at p. 1465 [FSC]

[61] Manning, 'Psychiatric Evidence' 1975-76 at pp. 327-8

[62] see chapter 4.1.3

he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath.[63]

In normal course every witness is regarded as a man of conscience, who cannot be expected to indulge in making false accusations, no matter what his relations may be with the accused. The evidence of every witness is presumed to be dictated by his conscience, unless the presumption is rebutted by a positive evidence showing that the witness has given evidence under some influence of hostility towards the accused or similar consideration[64]

The absence of malice assumes importance in assessing the credit of a witness and places him in a favourable position.[65] Absence of grudge or enmity does not always make a witness truthful.[66] It will not be safe to place reliance on the testimony of a witness who outwardly seems to be entirely independent but whose deposition intrinsically lacks on accuracy and veracity and is also falsified by other reliable circumstances on record.[67]

The safest rule of appreciation of evidence is whether the statement of a particular witness is in consonance with probabilities, and materially fits in with other evidence so as to inspire confidence of

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[63] Abdul Nasir v. The State 1980 P Cr. L J 898 at p. 900 [Lahore]; also see chapter 4.1.3

[64] Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 537 [Karachi]

[65] Rab Nawaz v. The State 1983 P Cr. L J 318 at p. 322 [Lahore] giving example of Bashir Ahmad v. Muhammad Azam and another PLD 1969 SC 469 where it was held that it does not necessarily mean that witnesses who are not relatives are the witnesses of the truth.

[66] Abdul Wahab and another v. The State 1985 P Cr. L J 771 at p. 773 [Lahore]; Usman and 6 others v. The State 1984 P Cr. L J2411 at p. 2417 [Lahore] following Muhammad Rehman and 2 others v. The State PLD 1976 Lah 1403; Abdul Hamid v. The State 1984 P Cr. L J 1089 at p. 1093 [Lahore]; Muhammad Nawaz and others v. The State 1983 P Cr. L J 1487 at p. 1499 [Lahore]

[67] Mulazim Shah v. The State 1990 P Cr. L J 431 at p. 436 [Peshawar]

truth in a reasonable and prudent mind.[68] No inflexible rule of appreciation of evidence can be laid down as to when a witness is to be believed or disbelieved. The statement of a witness is to be read as a whole in the light of the circumstances of each case and it should be decided whether the witness is reliable or not.[69] The truth or the falsity of the statement of witness largely depends upon the circumstances which provide the guideline. The acid test of the veracity of the witness is the inherent merit of his own statement.[70] Witnesses are divided into three categories by the case law on the basis of credibility. They are i. absolutely dependable, ii. absolutely not dependable and iii. partly dependable witnesses.[71] Conviction may be safely sustained on uncorroborative testimony if the witness is absolutely reliable. Even the strongest corroboration may not rehabilitate such evidence which is absolutely unreliable.[72] And the rule of prudence would require independent assessment of evidence when the witness is partly reliable.[73] It will be obvious from the

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[68] Javed Iqbal and 3 others v. The State 1991 P Cr. L J 40 at p. 47 [Lahore]; Akhlaq Ahmad and others v. The State 1988 P Cr. L J 1655 at p. 1659 [Lahore] following Din Muhammad 1969 SCMR 777

[69] The State v. Muneer Ahmad and 6 others 1993 P Cr. L J 128 at p. 132 [Karachi]; Sardar Muhammad Khan v. Muhammad Afsar Khan and 3 others 1991 P Cr. L J 508 at p. 518 [SC(AJ&K)]

[70] Gul Wazir v. The State 1992 P Cr. L J 2631 at p. 2635 [Peshawar]; State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 at p. 1740 [SC(AJ&K)]; Muhammad Usman and 6 others v. The State 1984 P Cr. L J 2411 at p. 2417 [Lahore] following Muhammad Iqbal and another v. The State 1978 P Cr. L J 670; Mirza Bashir Ahmad v. The State 1983 P Cr. L J 1899 at p. 1903 [Lahore]; Rab Nawaz v. The State 1983 P Cr. L J 1507 at p. 1511 [Lahore]; Rab Nawaz v. The State 1983 P Cr. L J 318 at p. 322 [Lahore] giving example of Bashir Ahmad v. Muhammad Azam and another PLD 1969 SC 469 where it was held that it does not necessarily mean that witnesses who are not relatives are the witnesses of the truth.

[71] Ashrafuddin v. The State 11 BLD 1991 HCD 435 at p. 448; Muhammad Nawaz and another v. The State 1983 P Cr. L J 1726 at p. 1732 [Lahore]

[72] Sher Ali v. The State 1985 P Cr. L J 349 at p. 456 [Lahore]

[73] Javed Iqbal and 3 others v. The State 1991 P Cr. L J 40 at p. 48 [Lahore]; Muhammad Hussain v. The State 1985 P Cr. L J 970 at p. 976 [Lahore]

discussion of the next chapter that Courts mostly deal with the third kind of witnesses. Therefore the maxim *falsus in uno falsus in omnibus* (false in one, false in all) has all along been discarded by the Courts of Pakistan and Bangladesh in the administration of criminal justice.[74] Similarly, the rule that integrity of a witness is indivisible has not been endorsed by the superior Courts as one of universal application.[75]

Each case has to be treated on its own merits.[76] The Court can rely on the evidence which it considers worthy of credence and ignore the rest of it.[77] But the credibility of a witness can be divided by the Court only in exceptional circumstances.[78] The important

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[74] Saeed v. The State 1992 P Cr. L J 1817 at p. 1821 [FSC]; Azim Gul v. The State 1990 P Cr. L J 117 at p. 124 [Peshawar] following Khanan Khan and others v. The State PLD 1966 (W.P.) Pesh 232, Khanan and others v. The State 1968 SCMR 1314 and Muhammad Shafi and 4 others v. The State 1974 SCMR 289; Muhammad Talib and another v. The State 1988 P Cr. L J 1399 at p. 1406 [Karachi]; The State v. Lalu Miah 39 DLR 1987 AD 117 at p. 148; Muhammad Hussain alias Mulla v. The State 1986 P Cr. L J 337 at p. 343 [Karachi] following Tawaib Khan and others v. The State PLD 1970 SC 13; Allah Yar and 7 others v. The State 1984 P Cr. L J 3071 at pp. 3084-5 [Lahore] following Tawaib Khan and another PLD 1970 SC 13; Muhammad Banaras and another v. The State 1984 P Cr. L J 496 at p. 502 [Lahore] following Mela and others v. The State PLD 1962 Lah 58; Abdul Shakoor and 2 others v. The State 1982 P Cr. L J 32 at p. 38 [Lahore]; Muhammad Rafiq v. The State 1981 P Cr. L J 1304 at p. 1311 [Lahore] ; Nurul Islam and others v. The State BLD 1987 HCD 193 at p. 199

[75] Ali Gohar and 2 others v. The State 1984 P Cr. L J 1111 at p. 1122 [Karachi] following Tawaib Khan v. The State PLD 1970 SC 13, Jinda and 2 others v. The State 1980 P Cr. L J 327 and Khairu and another v. The State 1981 SCMR 1136

[76] Yaqub and 2 others v. The State 1980 P Cr. L J 556 at p. 560 [Lahore] following Tawaib Khan v. The State PLD 1970 SC 13; Jinda and 2 others v. The State 1980 P Cr. L J 327 at p. 331 [Lahore] following Tawaib Khan v. The State PLD 1979 SC 13; Muhammad Nawaz and another v. The State 1983 P Cr. L J 1726 at p. 1731 [Lahore] following Muhammad Hussain v. The State PLD 1960 SC 387 and Tawaib Khan and another v. The State PLD 1970 SC 13

[77] Mir Bashai v. The State 1990 P Cr.L J 1225 at p. 1230 [Peshawar] following Tawaib Khan and another v. The State PLD 1970 SC 13; Janib and 2 others v. The State 1986 P Cr. L J 583 at p. 593 [Karachi]

[78] Imam Bux v. The State 1979 P Cr. L J 1008 at p. 1012 [Karachi]

consideration which has always been weighed while assessing the evidence of the witness are :

i. whether they are partisan witnesses

ii. had they any cause or reason to make false allegations

iii. whether any enmity existed between the witnesses and the accused

iv. whether there was any special relationship of interest of the witnesses with deceased of the complainant party[79]

v. whether the evidence is consistent with probabilities and other evidence

vi. whether it fits in with the material details of the case

vii. whether the testimony is straightforward, etc.[80]

Although it is unfortunate that in criminal cases generally and in sex cases particularly parties conceal and suppress true facts favourable or befitting to their cases, it is the onerous duty of the Courts to accept true facts and discard the false ones to arrive at a just conclusion to dispense administration of justice.[81]

A person of bad character can be a credible witness. It is the inherent worth of his statement that matters and not his character.[82] It was decided by Lahore High Court that a witness would not be disqualified from being a competent witness if he is involved in a theft case[83] but in a later decision from the same Court it was decided that the involvement of a witness in a theft case makes him a man of questionable respectability and his testimony can

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[79] Allah Yar and 7 others v. The State 1984 P Cr. L J 3071 at p. 3080 [Lahore]

[80] Mollah and others v. The State 11 BLD 1991 HCD 295 at p. 299

[81] Saeed v. The State 1992 P Cr. L J 1817 at p. 1821 [FSC] following Sharif Khan v. The State 1991 P Cr. L J 1992

[82] Muhammad and another v. The State 1984 P Cr. L J 326 at p. 331 [Karachi]

[83] Ghulam Muhammad v. The State 1982 P Cr. L J 231 at p. 233 [Lahore]

hardly be relied upon.[84] A natural witness, who is not related to the deceased or inimical towards the accused, would not lose his veracity only because he was involved in a case under the Gambling Act or in a case under section 307 of the Pakistan Penal Code.[85] He cannot be considered an unreliable or interested witness.[86] In a murder case the main eye witness was admittedly inimical towards the appellants and had a bad character. Two other eye witnesses were not mentioned in the first information report and when brought in the trial stage they turned hostile. However, certain aspects of the statement of one of the hostile witnesses in his examination in chief were considered for corroborating the main witness, along with the medical report. He was considered a credible witness by the Lahore High Court even though he was admittedly of bad character.[87] The same High Court in the same year in another case decided that when motive is alleged by the prosecution witness and is found to be false, evidence of such witness has to be thoroughly scrutinised.[88] In an earlier decision by the same Court it was held in a double murder case that no implicit reliance can be placed on the testimony of a witness giving inconsistent versions at different stages, but a witness need not be disbelieved merely because a part of his version is false.[89] The first part of this decision, that no reliance can be placed on the testimony of a witness giving inconsistent versions, is

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[84] Ghaus Bakhsh v. The State 1985 P Cr. L J 2958 at p. 2961 [Lahore]

[85] The Public Gambling Act,1867 [Act III of 1867]; Section 307 of the Penal Code deals with attempt to murder

[86] Muhammad Aslam v. The State 1986 P Cr. L J 2638 (2) at p. 2642 [Lahore]

[87] Sher Khan and another v. The State PLD 1985 Lahore 554 at p. 560 following Abdul Hakim etc. v. The State PLD 1971 Karachi 239, Nazo alias Ali Nawaz v. The State 1974 P Cr. L J 313

[88] Abdul Aziz alias Aziz and another v. The State PLD 1985 Lahore 534 at p. 538

[89] Haq Nawaz and 2 others v. The State PLD 1983 Lahore 682 at p. 686

according to Islamic law.[90] In other words the general Courts are of the view that truthfulness regarding the fact needs to be proved rather than the truthfulness of the person whereas the Federal Shariat Courts have adhered close to the principle of Islamic view.

It is not necessary for the prosecution to examine all the eye witnesses in a criminal case when witnesses are equally related to the parties concerned as relatives are interested in the outcome of the case.[91] It has been consistently held by the superior Courts that an interested and inimical witness is as much credible witness as a totally disinterested person provided independent corroboration is sought.[92] For example, when the prosecution evidence in regard to the majority of the accused is disbelieved, it cannot be accepted in regard to the remaining of the accused in absence of confirmatory evidence connecting the accused.[93] If some witnesses are believed *qua* some of the accused, under appropriate circumstances they can be safely relied upon *qua* other accused.[94] If the testimony of eye witnesses is disbelieved against some accused, it does not necessarily

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90 *al Risala*, 1961, p. 245; similar decision in The State v. Fazu Kazi alias Fazlur Rahman and others 1978 BSCR 413 at p. 419

91 State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 at p. 1740 [SC (AJ&K)]

92 Saiful Malook and another v. The State 1991 P Cr. L J 205 at p. 210 [Peshawar]; Abdul Ghafoor v. The State 1991 P Cr. L J 752 at p. 754 [Karachi]; State v. Ashraf and another 1984 P Cr. L J 226 at p. 231 [Karachi]; Ghulam Sikandar v. State PLD 1985 SC 11 at p. 24; Munawar Ali alias Munawar Hussain v. The State SC 251 at p. 256; Muhammad Sulleman v. The State PLD 1985 Quetta 228 at p. 232 citing Ghulam Sikandar PLD 1985 SC 11; Dil Nawaz Khan v. The State 1988 P Cr. L J 949 at p. 953 [Peshawar] following Rehmat and others v. The State PLD 1959 SC (Pak) 109 and Zulfiqar Ahmad v. The State PLD 1986 SC 477; Muhammad Talib and another v. The State 1988 P Cr. L J 1399 at p. 1406 [Karachi]; Karam Ilahi v. The State 1985 P Cr. L J 623 at p. 638 [Karachi]; Muhammad Akhatar v. The State 1983 P Cr. L J 1641 at p. 1644 [NP]

93 Dil Nawaz Khan v. The State 1988 P Cr. L J 949 at p. 953 [Peshawar]; Muhammad Ayub and others v. The State 1985 P Cr. L J 412 at p. 417 [Lahore]

94 Muhammad Sharif v. The State 1982 P Cr. L J 615 at p. 618 [Lahore]

have to be disbelieved against other accused. The fact that a witness is disbelieved in part should put the Court on caution and the duty cast in this situation is to scrutinise, and to consider the circumstances and possibilities appearing from the entire evidence with care and caution.[95] If the evidence of a eye witness is found not to be divisible and if the witness are disbelieved regarding one accused, they cannot be believed against those other accused.[96]

A witness who does not exaggerate in attributing a larger role to the accused than one played, or increase the number of assailants to falsely implicate others, can be believed although he may be the solitary witness.[97]

If a witness makes glaring discrepancies, omissions and contradictions the obvious inference would be that he is not a witness of truth.[98] To disbelieve a witness it is not necessary that there should be numerous infirmities. One infirmity impeaching the credit of a witness may make the entire evidence doubtful.[99] If a witness deliberately denies an admitted fact then his testimony is

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[95] Muhammad Sher v. The State 1982 P Cr. L J 534 at p. 539 [Lahore] similar case Nabi Bux and another v. The State 1990 P Cr. L J 1018 at p. 1022 [Karachi] following Abdul Hamid and another v. The State 1985 P Cr. L J 1992 and Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11

[96] Karim Bakhsh and another v. The State 1985 P Cr. L J 2298 at pp. 2301-2 [Lahore] following Muhammad Khan and another v. The State PLD 1984 Lah 522 and Muhammad Nawaz v. The State 1984 SCMR 190

[97] Muhammad Amin and others v. The State 1986 P Cr. L J 925 at p. 930 [Lahore]

[98] Shahjahan Biswas and others v. The State BLD 1989 AD 18 at p. 20; Abul Kashem and others v. The State BLD 1989 AD 122 at p. 126; Abdul Majid v. The State 1989 P Cr. L J 2205 at p. 2209 [Lahore]; Muhammad Yar and 4 others v. The State 1987 P Cr. L J 2224 at p. 2228 [Lahore]; Aklas Mia and others v. The State 25 DLR 1973 HD 398 at p. 403

[99] Abdul Wahab and another v. The State 1985 P Cr. L J 771 at p. 772 [Lahore]

rendered completely untrustworthy.[100] A witness who has contradicted his previous statement[101] or on an important point which has a material bearing on the culpability of the accused,[102] or the main part of occurrence[103] is not to be believed on that point. When witness shift their stand from the one disclosed in the first information report, the correct legal position would be to have careful appraisal of the whole statement, to accept the correct part and reject the incorrect part.[104] When the honesty of the witness are in question it would not be correct to accept their verdict against one and reject the same against the other.[105]

When both parties are injured, they never come up with the true story, there is always an attempt to minimise one's role[106] because it proves mutual enmity and counter attack by one of the parties. When there exists litigation between parties and they are inimical to each other, there is a heavy duty upon the Court to be on double alert to find out the truth. In such circumstances, the testimony of a related, inimical and interested witness has to be deeply appreciated

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[100] Faiz Muhammad and 2 others v. The State 1986 P Cr. L J 973 at p. 978 [Lahore]

[101] Muhammad Manzoor and 2 others v. The State 1985 P Cr. L J 59 at p. 67 [Lahore]

[102] Faridullah Shah and another v. The State 1990 P Cr. L J 1945 at p. 1952 [Peshawar]; Ali Nawaz v. The State 1987 P Cr. L J 1373 at p. 1378 [Karachi] following The State v. Khalil-ur-Rehman PLD 1960 (W.P.) Pesh 50 also see Mooso v. The State 1975 P Cr. L J 206 and Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11

[103] Dil Nawaz Khan v. The State 1988 P Cr. L J 949 at p. 952 [Peshawar]

[104] Abdul Khalique v. The State 1983 P Cr. L J 898 at p. 903 [SC Azad J&K] following Muhammad Sharif v. The State PLD 1978 SC (A J& K) 146 and Tawaib Khan v. The State PLD 1970 SC 13

[105] Muhammad Nawaz and others v. The State 1985 P Cr. L J 1796 at p. 1802 [Lahore]; Yunus v. State 34 DLR 1982 HD 208 at p. 212

[106] Muhammad Amin v. The State 1984 P Cr. L J 1681 at p. 1685 [Lahore]

to find out the truth. Independent corroboration is a must,[107] and the Court is competent to draw conclusions.[108] Although it is the duty of the prosecution to discharge the burden of proof, the ascertainment of truth is the primary duty imposed upon a judge and he is not absolved from attempting to perform that merely because neither side comes out with truth.[109] This reflects the combination of both inquisitorial and adversarial system applicable in the Courts of Pakistan and Bangladesh.

A stock witness who had appeared in many cases for the prosecution can be believed if nothing is shown about the witnesses having personal grievance or grouse against the accused.[110] A stock witness is a witness who acts in a number of cases.[111] If a person appears as a recovery witness in two cases, it does not taint his evidence, rather it shows the truthfulness of the persons for which he is called as a recovery witness.[112] A witness may have unsatisfactory relations with the accused, but that is no reason to hold him to have spoken untruths and half truths.[113]

When the witness is not an objective spectator but an observer involved in the event, and subject to distortions of his own heightened emotional and intellectual expectations and needs, the possibility of error in the judges reconstruction of event is

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[107] Muhammad Sharif Khan v. The State 1991 P Cr. L J 1992 at p. 1997 [(Sh. Court) AJ&K)]

[108] Muhammad Sarwar and others v. The State 1984 P Cr. L J 1714 at p. 1717 [Lahore]

[109] Nabi Bux and another v. The State 1990 P Cr. L J 1018 at p. 1022 [Karachi]

[110] Allah Yar and 7 others v. The State 1984 P Cr. L J 3071 at p. 3080 [Lahore] following Ali Hussain and another v. Mukhtar and 2 others 1983 SCMR 806

[111] Salim Khan and another v. The State 1991 P Cr. L J 1950 at p. 1955 [Karachi]

[112] Khalil Ahmad Arif Sharif Aadmi v. The State 1987 P Cr. L J 878 [FSC]

[113] Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 537 [Karachi]

compounded by the necessity of discounting what the judge believes to be the effect of such involvement on the witnesses' observation, memory and relation. It is within the discretion of the judge, who is in a favourable position, to predict whether the probative value of the evidence is substantially outrageous by the problems --- such as prejudice, surprise, and undue consumption of time --- created by its admission.[114]

Minor discrepancies are natural in the statements of truthful witnesses.[115] If the witness is honestly confused the Courts should ignore such inadvertent error.[116] The statement of a witness cannot be discarded in its entirety because of a single mis-statement. The part of the statement that finds corroboration from other evidence on record is to be believed.[117] A witness cannot corroborate himself in any manner by giving evidence of different categories.[118]

Natural witnesses should not be discarded only because they happen to know the deceased.[119] Highly unnatural conduct and discrepant and contradictory statement of the related eye witnesses would show that most probably they were not present at the spot.[120] The status of such witness is no better than a chance witness.[121] It appears that some people claim to be eye witnesses although it is proved later that they were nowhere near the incident when it occurred. No research has been done to find out why they do so. Apart from being interested it is to be assayed whether or not the apparent possibility

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[114] Weinstein, 'Some Difficulties .....' 1992 at p. 330

[115] Nasir Ahmad v. The State 1983 P Cr. L J 1039 at p. 1042 [Lahore]

[116] Sadiq Masih v. The State 1993 P Cr. L J 547 at p. 551 [Karachi]

[117] Mulazim Shah v. The State 1990 P Cr. L J 431 at p. 435 [Peshawar]

[118] Arif Khan v. The State 1988 P Cr. L J 1483 at p. 1488 [Lahore]

[119] Harsan v. The State 1989 P Cr. L J 809 at p. 812 [Karachi]

[120] Ghulam Rasool v. The State 1985 P Cr. L J 1097 at p. 1102 [Lahore]

[121] Azeem and 2 others v. The State 1983 P Cr. L J 488 at p. 492 [Karachi]

of the motivation to be part of history, to be participant in an official police case, especially one which is highly publicised, is a powerful drive which pushes some people to perjury.[122]

It appears that there is a difference between discrepant statement and contradictory statement. The discrepant statement is one which is either irrelevant or incoherent, but it is not irreconcilable. A discrepant statement is not fatal to the credibility of a witness. A contradictory statement is one which is conflicting and is not reconcilable with other statements either of his own or any other witness. It is open to a Court either to reject the whole of the evidence of a witness as untrustworthy or to reject the contradictory part as unreliable, or to rely upon that portion, which in the opinion of the Court fits in with the other evidence and facts and circumstances of the case. The exercise is guided by judicial discretion.[123]

As far as the cognitive credibility of the witness is concerned it is a well settled principle that a person's right perception of an object seen by him depends amongst others on the following circumstances:

i. on his situation relative to the object viewed, his nearness to or distance from it,

ii. on his capacity to see with perfect or sufficient distinction a far-off object.

iii. the person may be far sighted or short sighted,

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[122]Yarmey, 1979, p. 167

[123]Moyezuddin and another v. The State 1979 BSCR 82 at p. 85

iv. his right perception of the object depends on the light by which it is seen, e.g. day light, moonlit night, dark night, torch, electric bulb, etc.

v. the length of time in which he observes the object,

vi. his freedom of view from all obstructions at the time even if it is momentary,

vii. the existing weather at the time may affect proper observation, e.g. too strong sun shine, snow fall, heavy rain or dense smoke.[124]

It is also an important factor whether the persons identified were previously known to the witnesses or were completely strangers to them.[125]

However keen the sense of observation of a person may be, the Court pointed out that too much concern for details can sometimes cause one not to see the forest for the trees.[126] It would, however, not be safe to convict on identification evidence alone. The Court should look for corroborative evidence to indicate that the accused took part in the commission of the offence.[127] Little variation in the distance given by the witnesses is not a material discrepancy as to discredit their statements.[128] It is an established principle of criminal law that when the presence of the eye witness is established at the spot, any inconsistency in his statement and medical evidence can be overlooked specially where many persons attack the complainant

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[124] Zulfiqar Ali alias Dittu and another v. The State 1991 P Cr. L J 1125 at p. 1128 [Lahore]

[125] State v. Abdur Rahman 27 DLR 1975 HD 79 at p. 91

[126] Irshad Ahmad and another v. The State 1990 P Cr. L J 374 at p. 387

[127] Tafazzal Haque and another v. The State BLD 1986 HCD 418 at pp. 422-3

[128] Muhammad Naseem v. The State 1981 P Cr. L J 1292 at p. 1296 [Lahore]

party. It would be too much to expect from the eye witness to state exact terms which caused injuries by what weapon.[129]

It is to be noted that no matter how specifically the sense organs may function, the signals cannot be conveyed to the brain in the same form as they are received. Human mind is susceptible to making mistakes no matter how diligent they are.[130] There are no concrete absolutes in perception : instead, what is perceived may roughly be described as a series of functional probabilities.[131] Some incorrect statements in respect of distance or in respect of another prosecution witness would not mean material contradiction in material particulars.[132] Likewise evidence of rural witnesses should not be judged by the same standard of exactitude and consistency as that of urban witness.[133] Experimental research, in the west, on the psychology of testimony during the years and decades has confirmed the finding of William Stern, a German psychologist, that 'the complete accurate recollection is not the rule but the exception'.[134] The fact that the witnesses are not examined on the same day will not throw doubt as to their presence at the time of occurrence,[135] but statements of eye witnesses recorded after long interval of the incident is of no value and merits to be ignored.[136] A witness who

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[129] Haji Hamal and others v. The State 1986 P Cr. L J 1121 at p. 1127 [Quetta]

[130] Trankell, Arne, *Reliability of Evidence*, London, 1972, p. 13; Ataur Rahman and others v. The State 43 DLR 1991 HD 87 at p. 91

[131] Marshall, James, *Law and Psychology in Conflict* 2nd ed., Indianapolis et al, 1980 p. 9

[132] Ayoob and another v. The State 1981 P Cr. L J 706 at p. 708 [Karachi]

[133] Ataur Rahman and others v. The State 43 DLR 1991 HD 87 at p. 91

[134] Undeutsch, 'Statement Reality .....' 1982, at p. 27 referring to Stern William, Zur Psychologie der Aussage: Zeitschrift furplie gesamte strafrechtswissenchaft, Separat : Berlin : Guttentag, p. 327

[135] Sher Zaman alias Shero v. The State 1983 P Cr. L J 2519 at p. 2526 [Peshawar] following Mehr Ali and others v. The State 1968 SCMR 161

[136] Statement was recorded in The State v. Badiuzzaman and another 25 DLR 1973 HD 41 at p. 47 after 5 hours; although it was little late yet it was used

keeps silent for a long time about the incident throws doubt on the truthfulness of his testimony.[137] Section 157 of the Code of Criminal Procedure makes only such statements admissible that are made at or about the time when the fact took place before any authority legally competent to investigate the fact. The factor of time mentioned in this section is very important to serve as a safeguard against fabrication or false evidence.[138] This rule is in accordance with the Islamic law of Takadim. It is understood that with passage of time, i.e. Takadim, sinister motives might influence a man.[139]

The discussion has been made so far on the assumption that the witness has the understanding and prudence to testify. In certain cases it may be important to verify the competence in terms of mental ability of persons who appear as witnesses.

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for corroborative evidence; in Iman Ali and another v. The State 25 DLR 1973 HD 407 at p. 408 after fifteen hours, in Khoka @ Jasimuddin v. The State 25 DLR 1973 HD 181 at p. 188 after twenty hours, in State v. Maqbool Ahmed alias Makoo and 2 others 1983 P Cr. L J 1140 at p. [Karachi] after fifteen days, in Moin Ullah and others v. The State 40 DLR 1988 HD 443 at p. 448 after a few weeks, in Muslimuddin and others v. The State BLD 1987 AD 1 at p. 7 after thirty four days, in Abdul Rashid v. The State 1986 P Cr. L J 621 at p. 623 [Karachi] after one month and twenty days, in v. The State 1984 P Cr. L J 1967 at pp. 1969-70 [Karachi] after two months, in Muhammad Mohsan alias Mohsan Ali v. The State 1982 P Cr. L J 648 at p. 653 [Lahore] after three months

[137] In Abu Taher Chowdhury and others v. The State 11 BLD 1991 AD 2 at p. 20 the witness kept silent for three days to disclose the facts of the murder; In Abdul Rashid alias Sheeda v. The State 1986 P Cr. L J 177 at p. 180 [Lahore] for four months the witness remained silent, following and another v. The State 1960(Pak) 223, where it was held that a witness not disclosing the occurrence for 24 hours was considered of least value, and in Qabil Shah and others v. The State PLD 1960 (W.P.) Kar 697 it was held that concealing facts for 48 hours made the testimony doubtful; In Abdul Mannan Miah @ Mannan Gain v. State BLD 1989 HCD 461 at p. 464 even after one year the eye witness failed to disclose the name of the accused.

[138] Khoka @ Jasimuddin v. The State 25 DLR 1973 HD 181 at p. 188

[139] *Hedaya*, 1791, Vol. II, p. 37

3.1.3 Understanding and Prudence

The common essential for the competency of a witness in the Islamic law, the Qanun-e-Shahadat and the Evidence Act is understanding and prudence.[140] Incompetence due to youth or extreme old age or deranged and defective intellect is perforce recognised by all the three laws. The testimony of a blind, deaf or dumb witness is not admissible against the senses that they lack.[141] A child[142] is heard if he is not tutored and is capable of answering the questions put to him.[143]

Islamic law considers probity and understanding to be the main factor for a competent witness. A convicted person and a non-Muslim, in theory, may therefore be considered as incompetent for lack of probity as stated above, though they have understanding and prudence. The reason for excluding a person interested in the outcome of the proceedings could be for the reason that the integrity of the person might get clouded by his interest in the case, and not for the reason of understanding and prudence. It may be noted that for worldly matters the testimony of a Fasiq is accepted in Islamic law.[144] This, by analogy, may mean a Fasiq is a competent witness for all matters except Hadd, as it is crime involving public right. A female witness may be honest but she is considered mentally immatured. But for practical reasons she is disallowed from being a

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140*Hedaya*, 1791, Vol. II, p. 668

141*Hedaya*, 1791, Vol. II, p. 682; Art. 3, Qanun-e-Shahadat; Ss. 118 and 119, Evidence Act

142see chapter 3.1.5

143*Risala* [Maliki text], by Abu Muhammad Abdullah ibn Abi Zaid al Qairawani, translated by Ah. Bello Muhammad Daura, Zaria, 1983, p. 133

144*Hedaya*, 1791, Vol. I, p. 75

witness only in Hudud cases.[145] The same reason would apply to a child, deaf, dumb and blind witnesses. Therefore it would seem that though Islamic law theoretically puts stress on the integrity and understanding of a witness, practically it may put stress on either of them depending on the civil or criminal nature of the case.

3.1.3.1 Disabled and Child Witness

There is a divergence of opinion as to blind, deaf and dumb persons in Islamic law regarding their competency as witnesses. Most of the jurists accept the testimony of persons with disability only regarding such evidence that their senses can perceive.[146] The established precedent within the scope of the Qanun-e-Shahadat and the Evidence Act would be according to the majority of the jurists' view.[147] Section 119 of the Evidence Act refers to dumb witness only. The position of deaf and blind witness can be construed by reading Section 118 with section 119. Qanun-e-Shahadat does not make any reference at all to deaf, dumb and blind witnesses. Article 3 as stated above considers all those who have understanding and prudence to be competent witnesses with the exception of persons convicted for slander and perjury according to the precepts of Qur'an and Sunna . Therefore if a blind, deaf and dumb witness can make himself intelligible and bring evidence against the senses that they can perceive, the court should allow such evidence as admissible. It was decided in Haider Hussain v. Government of Pakistan, [148] regarding

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[145] It may be noted that one of the arguments of this thesis is that a female witness is equal to a male witness by the standard of Islamic law. This theory is developed in chapters 6.1.1 and 6.1.2

146 Salama, 'General Principles....' 1982 at p.116

147 Art. 3, Qanun-e-Shahadat; Ss. 118-9, Evidence Act

[148] Haider Hussain v. Government of Pakistan PLD 1991 FSC 139 at p. 158

blind witness that the condition of eyesight will not apply in matters as may be proved by hearsay evidence. The evidence of a dumb person is admissible in all cases except Hudud offences if the evidence is written by the witness himself in the presence of the presiding officer of the Court.

A child witness, if he is mature enough to understand and answer, is accepted to testify in Maliki and some Hanbali school of Islamic law against injuries he has received only, provided he is not tutored.[149] The principle is the same regarding tutoring in Pakistan and Bangladesh as is established by case law. As far as injuries are concerned s/he can be a good witness against the injuries he has received as well as others. Qanun-e-Shahadat or the Evidence Act or the Islamic law does not define a child witness.[150] The requirement is the capacity of a witness to understand things rationally and to reply to them.[151] It seems that in Pakistan and Bangladesh a child witness would be a person who has not attained majority according to the Majority Act 1875 that is now considered to be eighteen years of age. It is not clear whether the age of the Guardianship Act,1890 will be extended to a child under guardianship. The age of discretion for a ward is twenty one years. If it is regarding sexual violence against a child wife, the age of consent is fourteen in Bangladesh according to Penal Code, 1860.[152] The law of sexual violence

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149*Risala* [Maliki text], 1983, p. 133, Salama, 'General Principles....' 1982 at p. 116

150Malaysia in essence follows the Evidence Act 1872 known as Evidence Act 1950. Malaysia has introduced section 134A which lays down the rules as to the admissibility of child evidence. The 1950 Act of Malaysia also does not define a child witness.

151Muhammad Yaqub v. The State 1993 P Cr. L J 1852 at p. 1855 [FSC]; Abul Kashem and another v. The State 42 DLR 1990 HD 378 at p. 385 following The State v. Badiuzzaman 25 DLR 1973 HD 41

152S. 375 Penal Code 1860.

contained in section 375 of Penal Code against a child wife in Pakistan was repealed with the introduction of the Zina Ordinance. No effective step has been taken even to restrain child marriages in Pakistan. Despite Child Marriage Restraint Act, 1929, child marriage is in vogue in the rural areas of Pakistan and Bangladesh. Without a proper remedy, the repeal of the law may cause the young wives untold suffering.[153] According to Penal Code a child of seven years[154] cannot be made liable, but a child of twelve years[155] of mature understanding will be made liable for crime. It follows from here that by statute a child accused or a victim can offer himself or herself as witness before attaining majority by the Majority Act. Decisions from Bangladesh cite the case law of undivided Pakistan that take a negative approach to show who is not a child of tender age. A child of ten,[156] eleven,[157] twelve,[158] or thirteen[159] is not considered as child of tender age by the case law. In Islamic law the criteria would be puberty or the age of puberty without proof of puberty according to the school of thought the child belongs. Though age of a child is a factor to determine the cognitive ability to testify, a young child tested under supportive conditions may

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153 see for details chapter 6.2.2

154 S. 82 of the Penal Code, 1860

155 S. 83 of the Penal Code, 1860

156 The State v. Badiuzzaman 25 DLR 1973 HD 41at p. 48; Abul Kashem v. State 42 DLR 1990 378 at p. 384 reliance is placed on 19 DLR Dacca 408, 11 DLR Dacca 338, 7 DLR Dacca 564; Muhammad Anwar v. The State 1985 P Cr. L J at p. 2505 [Lahore] following Hari Pada Debnath alias Haria and another v. The State 1968 P Cr. L J 569

157 Gadu Mia and ors. v. The State 44 DLR 1992 HD 246 at p. 250 following Ali Shah v. Emperor AIR 1933 Lah 667, 24 DLR 18, 25 DLR 41, AIR 1952 (SC) 54, AIR 1971 (SC) 1064 and 19 DLR 573

158 Abul Kashem v. State 42 DLR 1990 378 at p. 384 referring to 18 DLR Dacca 427

159 Abul Kashem v. State 42 DLR 1990 378 at p. 384 referring to 19 DLR Dacca 573; The State v. Badiuzzaman and another 25 DLR 1973 HD 41 at p. 48

perform well as an older child tested under less supportive conditions. This leads to the expectation of many age-by-task-by context interactions when eye witness tasks is studied.[160]

Some case law is cited to clarify in what circumstances a person otherwise unable would be competent. It will be seen that the test is understanding and prudence of each person to verify the fact.

The only case law that was available regarding deaf and dumb persons is Khushi Muhammad v. Jamat Ali,[161] a Supreme Court decision of Pakistan. It does not directly give rulings on the issue of witness testimony of dumb and deaf witnesses. One would come to the conclusion from the decision, as the deaf and dumb accused was allowed to give evidence, that deaf and dumb witnesses are also allowed to testify independently provided they understand the procedures. It was held that the deaf and dumb accused not only understood the proceedings through the interpretation by their own brothers, but one of the accused adduced defence evidence. They were considered to have fully and actively participated in the proceedings.

The other cases relate to the child witness testimony. It may be noted from below that a eight year old boy in one case was considered to be not mature but in another case a boy of the same age was found to be convincing. Even a five year old boy was found convincing when he was cross examined at length without the defence having been able to shake his credibility. Therefore whether a child will testify depends on the ability of each child and conviction of the judge as to

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[160]Goodman, Gail S. and Beth M. Schwartz-Kenney, 'Why Knowing a Child's Age is Not Enough : Influences of Cognitive, Social and Emotional Factors on Children's Testimony' in *Children as Witnesses* edited by Helen Dent and Rhona Flin, Chichester et al, 1992, pp. 15-32 at p. 18

[161]Khushi Muhammad v. Jamat Ali PLD 1984 SC 54 at pp. 59-61

the ability in each case. It depends on the nature of the statement of the child witness and the decision of the judge to attach any value to the same. It is considered necessary in Pakistan for the trial Court to test the intellectual capacity of a child witness by putting a few simple and ordinary questions before recording examinations.[162] The significance of such questions is that if the trial Court is not satisfied as to the child's capacity to depose, it should decline to examine him and if the trial Court is satisfied then it should administer oath to the witness and examine him in the ordinary way.[163] It is necessary that children understand the sanctity of oath before their evidence can be believed.[164] But their evidence is not inadmissible only because no oath was administered to a child witness.[165] On the other hand in Bangladesh it was decided that testing of intelligence of witness of tender age is not a condition precedent to the reception of his evidence, i.e. it is not imperative for the Court to subject a child witness to a preliminary examination before his evidence is received.[166] The rule of prudence require that the evidence of a child witness be subject to close and careful scrutiny.[167] Tender age of witnesses does not render their testimony as doubtful.[168] The Courts do not define 'tender age' but as mentioned above the Courts of Bangladesh have negatively defined

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[162] Abdul Jabbar v. The State 1992 P Cr. L J 101 at p. 106 [Karachi]; State v. Abdul Rahim and another 1984 P Cr. L J 1508 at p. 1515 [Karachi]

[163] State v. Abdul Rahim and another 1984 P Cr. L J 1508 at p. 1515 [Karachi]

[164] Khalid v. The State 1984 P Cr. L J 3060 at p. 3061 [Lahore]

[165] Abdul Jabbar v. The State 1992 P Cr. L J 101 at p. 106 [Karachi]

[166] State v. Badiuzzaman and another 25 DLR 1973 HD 41 at p. 48 supported by 19 DLR (Dacca) 408, 11 DLR (Dacca) 338 and 7 DLR (Dacca) 564

[167] Muhammad Din and 2 others v. The State 1988 P Cr. L J 238 at p. 244 [Lahore]

[168] State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 [SC(AJ&K)] at p. 1739

child witnesses who are not considered as witnesses of tender age. The child witnesses are sometimes complainant themselves, or are represented by their relatives, or at times are only witnesses to fact. It is not known how many children appear in Court cases every year in Pakistan and Bangladesh. Appearance in Court could by itself be traumatic for a child. No steps so far is known to have been taken in Pakistan or in Bangladesh to minimise the ordeal that a child has to go through especially when s/he is the victim of the situation.

Children could be bystander witnesses to crime and other legally significant events in which they are not otherwise involved.[169] The State v. Badiuzzaman[170] is such an example where a man killed his step mother because his father wanted to give away some land to her, as she was very young and childless. There was the evidence of two child eye witnesses, and of other people who soon came to the place of occurrence and heard about it from the two child eye witnesses and saw the dead body of the deceased. One of the child witnesses was a boy of ten/eleven years and the other was a girl of seventeen years. They were nephew and niece of the deceased. The Court discussed at length the convincing nature of the testimony of these two child eye witnesses. The accused was convicted on the evidence of these two child witnesses, corroborating the same with the convincing evidence furnished by the two most disinterested and independent witnesses, who were brothers *inter se* and neighbours of the deceased. This is also an instance when the Court might view hearsay evidence as convincing for corroboration.

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[169] Spencer, J.R. And Rhona Flin, *The Evidence of Children*, London, 1990, p. 258

[170] The State v. Badiuzaman 25 DLR 1973 HD 41

Research is continuing in the area of children's memories in the west. It seems that young children do differ from adult in the way they remember and recall events, but these differences do not necessarily undermine the accuracy of their evidence. Indeed, within their own familiar world, they can do much better than adults in some memory tasks.[171] The older children in a study in America showed greater resistance to the misleading information than did the younger children.[172] In several studies in the west children have been shown to be extremely resistant to suggestion,[173] although misleading suggestions can impair their ability to remember the events they saw.[174] The Lahore Court, in Amir Khan v. The State,[175] a case of triple murder of women, could not accept the testimony of two young children whose presence was natural. The testimony was not accepted on the ground of their having been tutored and not being examined straightaway. It shows that the Court believed that an examination of the children immediately after the occurrence would have saved their testimony from outside suggestions. Also because the complainant changed the set of accused three times this must have given rise to doubts in the mind of the Judge. Similarly if a child witness of ten/eleven years

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171 Lloyd-Bostock, Sally, *Psychology in Action*, London, 1988, p. 87-8

172 Goodman, Gail S., Christie Aman and Jodi Hirschman, 'Child Sexual and Physical Abuse : Children's Testimony' in *Eyewitness Testimony* edited by Stephen J. Ceci, Michael P. Toglia and David F. Ross, New York et al, 1987, pp. 1-23 at p. 17

173 Lloyd-Bostock, 1988, p. 89

174 Zaragoza, Maria S., 'Preschool Children's Susceptibility to Memory Impairment' in *The Suggestibility of Children's Recollections* edited by John Doris, Washington DC, 1991, pp. 27-39 at p. 28

175 Amir Khan and 3 others v. The State PLD 1985 Lahore 18

claims to have given a statement at the instance of the Investigating Agency, the statement should be rejected.[176]

It appears from the case law of Pakistan that young children are often abused sexually. Child sexual abuse most probably did occur, in Pakistan before the Hudud Ordinances were passed, and, in Bangladesh, although no data is available. The recent case reports from Pakistan shows child abuse at distressingly high levels.[177] The reporting of child abuse may have increased with the availability of a new law to punish the offender. In Bangladesh child abuse must be existing but no official document is available.

The three following cases are examples of sodomy from the case reports of Pakistan. The general likelihood for children to testify in child abuse cases is that the child is often not only victim but also the only eyewitness. These cases revolve largely around the child's statements if the child is found able to understand questions and testify thereupon but as a rule of prudence the evidence of child witness must be corroborated.[178]

In Tajammal Hussain v. The State,[179] the Shariat Appellate Bench of the Supreme Court of Pakistan found that the testimony of the seven/eight years old boy regarding sodomy, which had been quoted by the Federal Shariat Court in its judgement was very convincing and was supported by other circumstantial evidences. The Court maintained the conviction of the accused.

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176 The State v. Jameel Ahmad and another 1984 P Cr. L J 1011 at p. 1014 [Karachi]

177 see chapter 6.2.2.1

178 State v. Abdul Rahim and another 1984 P Cr. L J 1508 at p. 1515 [Karachi] following Muhammad Sugal Esa Mamasan Rer Alalah v. The King AIR 1946 PC 3, Sultan and another v. The State PLD 1965 Kar 615 and Shahadat v. The State 1968 P Cr. L J 68

179 Tajammal Hussain v. The State PLD 1989 SC (Sh. App. B.) 747

Zulfiqar v. The State[180] is related to sodomy that was committed on a boy of five/six years. He was cross examined at length. The defence could not shake his credibility. He was a natural witness. His testimony was corroborated by his father and medical evidence coupled with the report of the chemical examiner. The Court admitted his testimony. Cross examination is likely to be the worst part of a child witness' ordeal. There is not yet any debate in Pakistan or Bangladesh on whether a review of the law of child evidence is needed.[181]

In Riazat Ali v. The State,[182] the victim of sodomy was a eight year old boy. The trial judge came to the conclusion that the victim was unable to understand and appear in this case. Three witnesses, the father, the elder brother and the maternal uncle of the victim appeared and unanimously deposed against the accused. The relationship with the victim was considered to be no ground to discard their testimony. The Court held that the witnesses had no motive to falsely implicate the accused nor was it accepted that they would level such allegation by falsifying a young boy of their family.

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180 Zulfiqar v. The State PLD 1985 FSC 404 at p. 410; In case of child abuse of kidnapping, in Faqir Muhammad v. The State 1985 P Cr. L J 2500 at p. 2502 [Lahore], the child of six/seven was found intelligent and credible.

181 For the position in England see Birch, D. J. 'Children's Evidence' in *Criminal Law Review*, April 1992, pp. 262-276

182 Riazat Ali alias Gogi Sain v. The State PLD 1985 Lahore 625 at p. 629; In Muhammad Anwar v. The State 1985 P Cr. L J 2503 at p. 2505 [Lahore] the victim of sodomy aged eight years was also found unable to understand questions put to him. In Niaz Ahmad v. The State 1989 P Cr. L J 778 at p. 781 [FSC] the Court concluded that conviction could not be based on the sole testimony of a child witness of nine years not capable of understanding questions and identifying the accused.

It is apparent that the rule of testimonial competence in cases of infants and disabled persons rely on judicial institutions and discretion.

3.2 Test for the Truthfulness of Witness Testimony

A close look at the case law of Pakistan and Bangladesh would show that the Courts are continuously faced with witnesses who are depicted as interested witnesses. For this reason most probably the theory of *falsus in uno falsus in omnibus* has become defunct. It has been the experience of the superior Courts, that the persons unconnected with the occurrence are invariably unwilling to render any assistance to the victims of the offence or come forward to give evidence as witness. Instead they hastily depart from the scene of offence to avoid being entangled in the case.[183] Independent natural witnesses often deny that they have observed the occurrence so as not to risk the animosity of the assassin or his partisans.[184] They hesitate or are reluctant to become witnesses for fear of repercussions.[185] It is not unknown that prosecution witnesses after their appearance as witnesses in murder cases were murdered by the accused parties.[186] They do not want to take the

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[183] Ali Gohar and 3 others v. The State 1984 P Cr. L J 486 at p. 493 [Karachi]; Abdul Khalique v. The State 1983 P Cr. L J 898 at p. 905 [SC Azad J&K] following The State v. Nur Ilahi and 3 others PLD 1976 Lah 677 and Abdul Rauf v. State PLD 1978 Kar 964

[184] Abdur Rehman v. The State 1983 P Cr. L J 2462 at p. 2469 [Peshawar] following Yaqoob Shah v. The State PLD 1976 SC 53

[185] Muhammad Haneef v. The State and another 1979 P Cr. L J 1078 at p. 1095 [Lahore]; The State v. Muhammad Zubair and another 1989 P Cr. L J 2116 at p. 2120 [Peshawar]; Abdul Baqi v. The State 1990 P Cr. L J 145 at p. 151 [Peshawar]; Muttal and 15 others v. The State 1984 P Cr. L J 209 at p. 219 [Lahore]

[186] Ahmad Khan and 2 others v. The State 1991 P Cr. L J 304 at p. 315 [Karachi]

risk of animosity of the accused and are unwilling to undergo humiliations and harassment at the hands of police and then in the Court wasting their precious time.[187] Therefore no adverse inference can be drawn because of the production of relatives[188] or interested witnesses[189] or police witnesses[190] or non examination of independent witnesses.[191] In narcotics cases especially, the public tend not to associate with the police for various reasons.[192] But nevertheless the legal requirement of the corroboration of interested and inimical testimony cannot be dispensed with. It would be highly unsafe to act upon the testimony of interested witness in the absence of corroboratory evidence.[193]

The Courts comment that their indifference is a lack of sense of moral responsibility as a good citizen and religious duty as a good Muslim.[194] It is unhealthy and uncommendable.[195] But the public alone cannot be blamed for this apathy. Apart from the traditional delay in the disposal of the cases when witnesses have to come to the

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[187] Shakar Khan v. The State 1983 P Cr. L J 1105 at p. 1109 [Peshawar]; Ali Gohar and 3 others v. The State 1984 P Cr. L J 486 at p. 493 [Karachi]; Javed Iqbal and 3 others v. The State 1991 P Cr. L J 40 at p. 49 [Lahore]

[188] The State v. Muhammad Zubair and another 1989 P Cr. L J 2116 at p. 2120 [Peshawar]; Muhammad Rafiq v. The State 1981 P Cr. L J 1304 at p. 1310 [Lahore]

[189] Shakar Khan v. The State 1983 P Cr. L J 1105 at p. 1109 [Peshawar]

[190] Wahid Bux and 2 others v. The State 1992 P Cr. L J 187 at p. 199 [Quetta]

[191] Gul Wazir v. The State 1992 P Cr. L J 2631 at p. 2636 [Peshawar]; Ahmad Khan and 2 others v. The State 1991 P Cr. L J 304 at p. 315 [Karachi]; Muhammad Saeed alias Pupoo and another v. The State 1990 P Cr. L J 1346 at p. 1352 [Lahore]; Ali Gohar and 3 others v. The State 1984 P Cr. L J 486 at p. 493 [Karachi]

[192] Naseer Ahmad v. The State 1993 P Cr. L J 1860 at p. 1866 [FSC]

[193] Allah Wasaya and another v. The State 1985 P Cr. L J 1034 at p. 1040 [Lahore]

[194] Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 538 [Karachi] following Yakoob Shah v. The State PLD 1976 SC 53 and Muhammad Iqbal alias Javed Iqbal v. The State PLD 1976 SC 291

[195] Shakar Khan v. The State 1983 P Cr. L J 1105 at p. 1109 [Peshawar]

Court time and again at their own expense and waste their precious time, there is a sense of insecurity amongst the public. They feel that the law enforcing agencies are not able to extend protection to them against the murderers who commit murder with impunity in towns and cities without check.[196]

Therefore the Courts are often left with witnesses who are interested in the outcome of the case. It puts the judges in a difficult situation to differentiate between the truth and falsehood in the statements of the witnesses. The Courts in Pakistan and Bangladesh generally infer the judgement through the ordinary human perception of the judges within the framework of the set exclusionary rules of evidence. The judgements therefore do not always reflect the truth, as it is impossible to attain certainty of truth in those circumstances. As the witness testimony is highly valued bringing direct evidence many research has been carried out in the west to see how much weight can be rested on such evidence. There is a revival of interest in law and psychology in the west.[197] No such research is done in Pakistan and Bangladesh. The result of the test done in the west would show that the test done in the Courts of Pakistan and Bangladesh by way of corroboration as to the credibility of interested witnesses could possibly the best way of judging through ordinary perception of the judges. Even the Islamic law of corroborating witness testimony is very sound when compared to the result of the research found in the west. It was found in the west that in many cases people perceive things very subjectively, arising from their pre-conceived notions.[198] The Courts have tended to

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[196]Ghulab and another v. The State 1986 P Cr. L J 1297 at p. 1306 [Karachi]

[197]Twining, William, London, 1985, p. 12

[198]Munsterberg, Hugo, *On the Witness Stand*, New York, 1927, pp. 49-55

concentrate on the characteristics of individual witnesses, since unreliability of such witnesses is based on individual characteristics, rather than what the law perceives to be the inherent unreliability of any witness who falls into one of the established categories.[199] The findings of the research in west as to the value of testimonial evidence depending upon the witness' power of perception and memory, ability to narrate, and his truthfulness[200] are similar to the value accorded to the witness testimony in Islamic law and the Courts of Pakistan and Bangladesh. Competency of a witness is a question of law rather than a question of fact and is decided by the trial Court.[201] Once a witness is competent his credibility to speak the truth is sought. In the west the proponents of eyewitness testimony think that the witness' background may be important to decide whether the witness is credible. The opponents argue that all witnesses are presumed credible until their credibility is attached and therefore the background testimony is irrelevant.[202] In Islamic law also as discussed in chapter two the jurists put emphasis on the witness' background.[203] In the west psychiatrists can be called to testify as to the mental health of a witness. It is doubtful whether psychiatrists can be asked to give their opinion as to whether the witness in fact is telling the truth in the witness box.[204] Recently

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[199]Murphy, Peter, *A Practical approach to Evidence*, London, 1980 pp. 480-1

[200]Notes and Comments, *The Criminal Law Quarterly*, 1973-74, Vol. 16, p. 25; for more see Starkman, David, 'The Use of Eyewitness Identification Evidence in Criminal Trials' in *The Criminal Law Quarterly*, 1978-79, Vol. 21, pp. 361-386 at pp. 361-2 and Stone, Marcus, 'Instant Lie Detection? Demeanour and Credibility in Criminal Trials' in *Criminal Law Review*, 1991, pp. 821-830 at p. 821

[201]Ferguson et al, 1978, p. 15

[202]Arnolds, Professor Edward et al, *Eyewitness Testimony Strategies and Tactics*, New York et al, 1984, p. 216

[203] see chapter 2.1.2

[204]Manning, 'Psychiatric Evidence' 1975-76 at p. 337; Notes and Comments, *The Criminal Law Quarterly*, 1968-1969, Vol. II, p. 130

there is an increased use of forensic-hypnosis in United States, Canada, UK, New Zealand and Australia.[205] Psychiatric opinion has not been tested in the Courts of Pakistan and Bangladesh for lie detection in the testimony of witnesses. The meaning of truth for the criminal justice system could be analysed and appreciated from different viewpoints. For the individual, truth is acquired from both sensory information and the different ways that the human nervous system has been genetically determined to deal with sensory experiences. Individuals are also parts of groups, societies and cultures. Truth must operate and emerge both within and between all of these separate levels. The concept of truth is therefore not equally shared by all people.[206] It is possible therefore that the psychiatrist and the client have different levels of understanding truth which may then lead to other problems.

3.3 Conclusion

Integrity in Islamic law for the purpose of Hadd and Qisas is different from the credibility of a witness in general law which is more in accord with the rules of Tazir. By analogy, or Qiyas, it could be said from discussion of the case law that, apart from the Hadd offences, a bad character or inimical or interested witness can still

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[205] Mc Conkey, Kevin M., and Peter W. Sheehan, 'Hypnosis and Criminal Investigation An analysis of Policy and Practice of Police in Australia' in *Criminal Law Journal*, 1988, Vol. 12, pp. 63-85 at pp. 63-64; for more see Kirby, Hon. Justice M. D., 'Hypnosis and the Law' in *Criminal Law Journal*, 1984 Vol. 8, pp. 152-165 at pp. 152 and 164; Alderman, Eric M. and Joseph A. Barrett, 'Hypnosis on Trial : a Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases' in *Criminal Law Bulletin*, 1982, Vol. 18, No. 1, pp. 5-37 at p. 5; Haward, Lionel and Andrew Ashworth, 'Some Problems of Evidence obtained by Hypnosis' in *Criminal Law Review*, 1980, pp. 469-485; Ruffra, Peggy S., 'Hypnotically induced Testimony : Should it be admitted' in *Criminal Law Bulletin*, 1983, Vol. 19, No. 4, pp. 293-324 at p. 296

[206] Yarmey, 1979, pp. 164-5

be a credible witness, although the Court would take caution against bad characters or false witnesses.

In other words the general Courts are of the view that truthfulness regarding the facts need to be proved, rather than the truthfulness of the person, whereas the Federal Shariat Courts have strived to adhere closely to the principles of the Islamic view.

The understanding and prudence of a witness is part of cognitive credibility forming the understanding of the perception of the event and explaining it unequivocally. There is more probability that children and people with defective intellect may not always be able to portray the scenario in the same manner as a healthy adult could do. Similarly a deaf, dumb and blind person may miss one or the other side of perception because of their disability.

The competency of an eye witness in pre-Qanun-e-Shahadat Pakistan and Bangladesh is based on understanding and prudence, whereas Islamic law requires, in addition, moral integrity of an individual. A close scrutiny will reveal that this theory is quite superficial. Absolute moral integrity is not essential in practical Islamic law, comprising of civil wrongs and Tazir offences, while moral integrity is not totally overlooked by the law of evidence in Pakistan and Bangladesh. The practice of each is somewhat in the middle. In theory, finding the truth is paramount in Islamic law and fact-finding is important in the existing system of Pakistan and Bangladesh. But in practice, to find out the truth of the matter to follow a fact finding procedure are processes working towards a similar goal.

It is recognised by the case law that even when a witness has the required understanding and unquestionable veracity, they mostly do not appear as a witness for fear of reprisal. Therefore the Courts are

left to deal with various categories of interested witnesses to assess the truth of a matter. Most possibly for this reason, the Courts are not keen to apply the rule of *falsus in uno falsus in omnibus*. The Courts are in a constant process of evaluating and weighing motivational credibility of witness testimony. The Courts of Pakistan and Bangladesh does not seem yet to have taken interest in the psychological aspect of lie detection. Most probably it is better for both the countries that they do not rush into introducing this in the legal system as the demerits of psychiatric opinion have also been pointed out. Moreover, if such kind of expert opinion is not handled judiciously there will be further delay in disposing of the cases. The following chapter examines the motivational credibility of different kinds of witnesses, named by the Courts, who possess the necessary cognitive credibility, understanding and prudence.

CHAPTER 4

4. Characteristics of different kinds of Witness

This chapter looks into the characteristics of different kinds of witnesses identified in the case law and stated in the statutes. These terms are frequently used in the case law assuming that the reader is conversant with them. A practising lawyer may be aware of these terminologies but a less frequent reader may not always understand the implication of using them. The reason is those terms specially the one evolved through case law have not been defined in any text book. The definition and elaboration of those terms in this chapter will also help to understand the moral evaluation of integrity and credibility of witnesses made by the Courts discussed in the previous chapter.

4.1 Characteristics of a Witness identified in the Case law

The Courts in Pakistan and Bangladesh constantly use certain terms denoting a type of witness, e.g. independent witness, natural witness, etc. These terms imply a constant moral evaluation of the motivational competence of a witness. These terms do not appear in the Qanun-e-Shahadat or the Evidence Act but they form part of the general case law of both the countries and some of them are part of Islamic law.[1] The case law has developed the rules relating to these terms. As Islamic law of evidence is not in use officially it has remained in the purview of the text books. Most of the terms used in this chapter are not in use in the parlance of English Court. It appears that these are typically Pakistani and Bangladeshi

[1] Salama, 'General Principles....' 1982 at p. 118

terminology. It seems that these terms are within the knowledge of the judges of Pakistan and Bangladesh, but there is no book or guide where these are defined or described. For that reason, at times an anomalous use of these terms is made in the Court decisions. In this sub chapter an attempt is first made to define these terms as used in the Courts of Pakistan and Bangladesh to judge the competence and qualification of a witness. Second, it is shown that, regarding relatives and police witnesses, the general Court of Pakistan and Bangladesh still follow in many respects the Islamic law of evidence within the ambit of interested witness, independent witness, partisan witness, etc. by bringing in a concept of probity related to facts rather than to the integrity of the person. It may be marked while elaborating the case law that interested, partisan and chance witness, etc. require corroboration as a rule of law but there could be exceptions as in independent witnesses, where corroboration of testimony may be a precaution.

A few terms frequently used in the Courts of Pakistan and Bangladesh do not appear in the text books of Islamic law generally, e. g. trap and hostile witness. Yet they are still in use in the Courts of Pakistan, even though it is understood that Islamic law prevails in Pakistan. Perhaps the concepts of trap witness or hostile witness are not inherently against the concept of the Islamic law. It is difficult to say whether the use of these terms, which have much in common with both Islamic law and case law in Pakistan and Bangladesh, is done consciously or not. It is also difficult to say whether the point of law made by a High Court which differs from the Islamic law as defined by the jurists is to be considered as an improvement or an explanation, or whether the judge was making a conscious attempt to exercise Ijtehad or independent legal reasoning.

It is also to be noted that the Courts do not identify the set of witnesses from their appearance. The Courts are solicitous in looking at the motivational credibility minutely. The cardinal principle of criminal justice is that the trial judge must scrutinise the prosecution evidence on its own merits in each case. The weight to be attached to the testimony of a witness depends, in a large measure, upon various considerations. For example, the evidence should be in consonance with probabilities and consistent with other evidences, and should generally so fit in with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however, independent or disinterested he may appear to be, his evidence cannot be relied on in the decision of the criminal cases.[2] The discussion below will demonstrate the nature of identification of witnesses and the rules involved therein.

4.1.1. Interested Witness

Integrity of the judicial system is important for fact-finding in the traditional set-up of the legal system, irrespective of the integrity of the witness. Integrity of a witness is part of the integrity of the larger spectrum of the judicial system. Where the integrity in terms of morality might not be available from a witness, this has to be compensated by the truth of the fact. To obtain truth of the fact the Court in Pakistan and Bangladesh would rely on relatives, police officials or partisan persons who are interested witnesses. The testimony of an interested witness is not disregarded by the Courts in

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[2] Amir v. State 1980 P Cr. L J 286 at p. 288 [Peshawar]

Pakistan and Bangladesh. The evidence is weighed to determine the probative value to be attached to it in given circumstances.[3]

An interested witness is a witness who has direct interest out of enmity or any other reason in getting the accused convicted[4] or who had a motive of his own to falsely implicate the accused[5] or who is has an ill will or animosity against the accused prior to the occurrence.[6] When the prosecution witness is closer in relationship to the accused rather than the deceased, he cannot be termed as an interested witness.[7] An interested witness may or may not be related to the party. It seems that a wide variety of reasons could be interpreted to mean direct interest in the outcome of the proceeding. Courts have some criteria to define an interested witness. Friendship *simpliciter* would not make the witness interested in the absence of

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[3] Ali Gohar and 3 others v. The State 1984 P Cr. L J 486 at p. 492 [Karachi]; for example Jaffar and another v. The State 1984 P Cr. L J 1027 at p. 1030 [Lahore] decided that interested witnesses require independent corroboration; also see similar cases Akbar and another v. The State 1984 P Cr. L J 3108 at p. 3112 [Karachi]; Ghulam Rasool and 3 others v. The State 1984 P Cr. L J 2702 at p. 2708 [Karachi]

[4] The State v. Mizanul Islam 40 DLR 1988 HD 58 at p. 70-1; Azim Gul v. The State 1990 P Cr. L J 117 at p. 123 [Peshawar]

[5] Waqar v. The State 1993 P Cr. L J 323 at p. 327 [Lahore]; Ahmad Khan and 2 others v. The State 1991 P Cr. L J 304 at p. 319 [Karachi]; Aurangzeb v. Muhammad Sadiq PLD 1990 Peshawar 161 at p. 165; Harsan v. The State 1989 P Cr. L J 809 at p. 813 [Karachi] following Nazir and others v. The State PLD 1962 SC 269; Barkat and another v. The State 1985 P Cr. L J 1276 at p. 1282 [Lahore] following Nazir and others v. The State PLD 1962 SC 269; Iftikhar alias Nanna v. The State 1985 P Cr. L J 2719 at p. 2722 [Lahore]; Rehana Khatoon v. The State 1985 P Cr. L J 1402 at p. 1409 [Karachi]; Muhammad Ajmal and others v. The State 1984 P Cr. L J 3015 at p. 3019 [Lahore]; Ghulam Hussain v. The State 1983 P Cr. L J 2382 at p. 2387 [Lahore]; Muhammad Afzal alias Ajoo v. The State 1985 P Cr. L J 1803 at p. 1807 [Lahore] following Nazir and others v. The State PLD 1962 SC 269; Mushtaq Ahmad and another v. The State 1984 P Cr. L J 1457 at p. 1462 [Lahore]

[6] Allah Ditta v. The State 1984 P Cr. L J 1071 at p. 1074 [Lahore]; It was held in Nawab Din and 2 others v. The State 1984 P Cr. L J 3089 at p. 3091 [Lahore] that enmity or criminal litigation existing 13 years before between the witness and the accused would not make the witness interested. This observation is debatable.

[7] Muhammad Amir Khan v. The State 1984 P Cr. L J 897 at p. 903 [Lahore]

any plausible motive to implicate the accused falsely.[8] It is well established that if a witness is a complainant in a case, or a victim of a crime, it does not make him an interested witness in the legal sense in the Courts of Pakistan and Bangladesh. The main consideration in such situation is whether he had the motive to implicate the accused falsely.[9] Parties involved in litigation, enmity, relationship, or otherwise persons having an interest in the case, are looked upon with caution by the Court.[10] Here, relatives, police officials and partisan witnesses are discussed as members of interested groups. It is to be noted that in most circumstances the relatives and police officials would also be natural witnesses.[11]

Relationship or personal interest is a disqualification for a witness in Islamic law for major offences, for they are considered interested in the proceeding and as such could be biased.[12] This rule is well developed as established by precedent in Pakistan and Bangladesh. It will be seen through the case law that relationship is not considered to affect understanding or integrity of a person, but precaution is taken as it might affect the truthfulness of a fact. The evidence of interested persons such as members of the family of affected persons

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[8] Khalil Ahmed v. The State 1983 P Cr. L J 1174 at p. 1179 [Karachi]; Muhammad Yausaf alias Babu v. The State 1984 P Cr. L J 1992 at p. 1995 [Lahore]

[9] Khanzada Mir v. State PLD 1979 Peshawar 215 at p. 221; Siad Malook alias Superdent v. The State 1989 P Cr. L J 2259 at p. 2263 [Peshawar]

[10] Abdul Aziz alias Aziz and another v. The State PLD 1985 Lahore 534 at p. 538; Shah Pasand v. The State 1989 P Cr. L J 1966 at p. 1969 [Peshawar]; Muhammad Sabir Hussain and others v. The State 1984 P Cr. L J 2231 at p. 2236 [Lahore]; Salahuddin v. The State 1983 P Cr. L J 2354 at p. 2356 [Karachi]

[11] see chapter 4.1.3

[12] Salama, 'General Principles....' 1982 at p. 118 the exception are the Zahiris and some Shafeis; Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 990 [J&K]; Muhammad Rashid Khan v. The State 1984 P Cr. L J 93 at p. 99 [Azad J&K]

ordinarily requires independent corroboration, but in cases where there is an obvious reason for non-availability of disinterested witnesses, the evidence of interested but competent witnesses may be relied upon. There is no presumption that an interested witness is unworthy of credit, nor is it a principle of law that an interested witness is unworthy of credit without corroboration, though corroboration is sought as a precaution,[13] as interest and truth may go together.[14] Perhaps to sieve truth from interest, the evidence of an interested witness should be scrutinised with care, and conviction should not be based upon such evidence alone, unless the Court can place implicit reliance thereupon.[15] There is no universal rule or provision of law that interested witnesses must always be corroborated. The practice of the Courts is to look for corroboration of the statement of an interested witness and particularly an inimical witness for the safe administration of justice.[16] It seems that the Court comes to a subjective conclusion in each case where it

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13 Inayat v. The State PLD 1987 Lahore 136 at p. 141; Azim Gul v. The State 1990 P Cr. L J 117 at p. 123 [Peshawar]; Waqar v. The State 1993 P Cr. L J 323 at p. 327 [Lahore]; Weram v. The State 1985 P Cr. L J 372 at p. 380 [Karachi]; Allah Wasaya and another v. The State 1985 P Cr. L J 1034 at p. 1040 [Lahore]

14 Faiz Muhammad and another v. The State PLD 1988 Lahore 149 at p. 158

15 Faiz Muhammad and another v. The State PLD 1988 Lahore 149 at p. 158 quoting Hammoodur Rahman J. in Ali Ahmad v. State PLD 1962 SC 102; Kahalilur Rehman and 2 others v. The State 1984 P Cr. L J 1094 at p. 1098 [Lahore]; Khamiso and another v. The State 1981 P Cr. L J 1049 at p. 1057 [Karachi]; Mati Mia v. The State 12 BLD 1992 HCD 126 at p. 127

16 Shah Alam and others v. State BLD 1990 AD 25 at p. 42; Isa and 3 others v. The State 1987 P Cr. L J 1551 at p. 1555 [Lahore]; Abdul Waheed v. The State 1993 P Cr. L J 666 at p. 671 [Lahore] following Nazir and others v. The State PLD 1962 SC 269 and Niaz and others v. The State PLD 1960 SC 387; Muhammad Nawaz and others v. The State 1985 P Cr. L J 1796 at p. 1802 [Lahore]; Khizar Hayat and 2 others v. The State 1984 P Cr. L J 54 at pp. 74-5 [Lahore]; Allah Ditta and others v. The State 1983 P Cr. L J 2259 at p. 2265 [Lahore]; State v. Waris and 3 others 1982 P Cr. L J 99 at p. 103 [Lahore]; Allah Dad and 4 others v. The State 1981 P Cr. L J 46 at p. 53 [Lahore]; Rais Ahmad v. The State 1979 P Cr. L J 175 at p. 177 [Karachi]

finds that an interested witness had been truthful in drawing the facts of the case.

Apart from the Hadd case mentioned in the Hudud laws of Pakistan corroboration is not positively required by statute. The practice of precaution taken by the judges on uncorroborated testimony has hardened into a rule of law by way of precedent. The rule of corroboration rests on the unreliability. The honesty and accuracy of the witness is tested by corroboration. In case of interested witnesses the honesty and accuracy of the witness is in question because s/he could be inherently unreliable because of his interest in the matter.[17]

It has to be noted that at times the Courts use the terms interested and partisan witnesses for the same meaning. It will be seen that there is a tendency to differentiate between an interested and partisan witness in the majority of case law. Therefore partisan witness is made a sub category of interested witness of this section.

4.1.1.1 Relatives

The majority of the jurists of Islamic law, with the exception of some jurist of the Shafei school of thought, argue that the testimony of the major and the minor branches of families for each other is inadmissible[18] in major offences.[19] There is a whole range of case law in Pakistan and Bangladesh elaborating this principle. The consistent view of the general Courts in both the countries is that

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[17]Developed by reading Elliot, D.W., *Elliot and Phipson, Manual of the law of Evidence*, 12th ed. London, 1987, pp. 159-68; Dennis, Ian, 'Corroboration Requirements Reconsidered' in *Criminal Law Review*, 1984, pp. 316-336 at p. 319

[18]Salama, 'General Principles....' 1982 at p. 118

[19]Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 990 [Azad J&K]; Muhammad Rashid Khan v. The State 1984 P Cr. L J 93 at p. 99 [Azad J&K]

mere relationship, whether with the deceased or the complainant or among the witnesses,[20] is no ground to discard the testimony of a witness[21] if it inspires confidence.[22] If the relatives do not tell the

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[20] Salar Khan v. Muhammad Ayub and 2 others 1986 P Cr. L J 1482 at p. 1486 [Azad J&K] following PLD 1978 SC (AJ&K) 96, 1978 SCMR 136, PLD 1978 Lah 1209, PLD 1979 SC (AJ&K) 23, 1979 P Cr. L J Note 142 at p. 90, PLD 1982 Lah 577, 1983 P Cr. L J 1507 and PLD 1983 SC (AJ&K) 211

[21] The State v. Lalu Miah 39 DLR 1987 AD 117 at p. 148; Qasam Jan v. The State PLD 1989 Peshawar 133 at p. 135; Ishaq v. The State PLD 1985 Karachi 595 at p. 600; Muhammad Achar v. The State PLD 1990 Karachi 314 at p. 317; Muhammad and others v. The State 1993 P Cr. L J 1632 at p. 1638 [Karachi]; Dastar alias Bhatti and another v. The State and 2 others 1992 P Cr. L J 610 at p. 614 [Shariat Court AJ&K]; Abdul Razaq and another v. The State 1992 P Cr. L J 1861 at p. 1869 [Shariat Court (Azad J&K)]; Gul Wazir v. The State 1992 P Cr. L J 2631 at p. 2635 [Peshawar]; Muhammad Saeed alias Pupoo and another v. The State 1990 P Cr. L J 1346 at p. 1352 [Lahore]; Noor Muhammad and 5 others v. The State 1988 P Cr. L J 1474 at p. 1481 [Lahore]; Abdul Waheed and another v. The State 1988 P Cr. L J 645 at p. 650 [Lahore]; Riaz Ahmad v. The State 1988 P Cr. L J 522 at pp. 525-6 [Lahore]; Zahid Hussain v. The State 1988 P Cr. L J 465 at p. 470 [Lahore]; Pervaiz and others v. The State 1987 P Cr. L J 2509 at p. 2515 [Lahore]; Faiz Muhammad and 2 others v. The State 1986 P Cr. L J 973 at p. 978 [Lahore] Zulfiqar Ali v. The State 1986 P Cr. L J 1241 at p. 1245 [Lahore]; Saifal v. The State 1985 P Cr. L J 2668 at p. 2672 [Lahore]; Karamat and others v. The State 1985 P Cr. L J 1982 at p.1984 [Lahore]; Farooq Azam v. The State 1985 P Cr. L J 2662 at p. 2666 [Lahore]; Sultan Mahmud v. The State 1985 P Cr. L J 1302 at p. 1308 [Lahore]; Sher Zaman and another v. The State 1985 P Cr. L J 1705 at p. 1710 [Lahore]; Jahana v. The State 1985 P Cr. L J 1773 at p. 1774 [Lahore]; Abdul Razzak v. The State 1985 P Cr. L J 1885 at p. 1889 [Lahore]; Nur Khan v. The State 1985 P Cr. L J 1892 at p. 1899 [Lahore]; Javid and 2 others v. The State 1985 P Cr. L J 1901 at p. 1905 [Lahore]; Muhammad Afzal alias Achha v. The State 1985 P Cr. L J 922 at p. 925 [Lahore]; Majibar Rahman and others v. The State BLD 1985 HCD 110 at p. 114; Muhammad Khan and others v. The State 1984 P Cr. L J 2769 at p. 2771 [Lahore]; Yusuf and 6 others v. The State 1984 P Cr. L J 684 at pp. 690-1[Lahore]; Muhammad Idris v. The State 1984 P Cr. L J 738 at p. 740 [Lahore]; The State v. Bago 1984 P Cr. L J 721 at p. 722 [Karachi]; Javed Ahmed v. The State 1984 P Cr. L J 965 at p. 969 [Karachi]; Allah Ditta v. The State 1984 P Cr. L J 1071 at p. 1074 [Lahore]; Allah Bakhsh v. The State 1983 P Cr. L J 1894 at p. 1898 [Lahore]; Muhammad Nawaz and another v. The State 1983 P Cr. L J 1726 at p. 1733 [Lahore]; Muhammad Hussain and others v. The State 1983 P Cr. L J 2537 at p. 2542 [Lahore]; Muhammad Ameen and another v. The State 1983 P Cr. L J 1533 at p. 1538 [Lahore]; Mahitullah Pk. and others v. The State BLD 1983 HCD 277 at p. 281; Rafique v. The State 1982 P Cr. L J 655 at p. 657 [Lahore] Sikandar and 2 others v. The State 1981 P Cr. L J 884 at p. 888 [Karachi]; Jaro v. The State 1981 P Cr. L J 565 at p. 570 [Karachi]; Allah Dad and 4 others v. The State 1981 P Cr. L J 46 at p. 52 [Lahore]; Muhammad Rafiq v. The State 1981 P Cr. L J 1304 at p. 1310 [Lahore] ; Muhammad Amin v. The State 1982 P Cr. L J 953 at p. 960 [Lahore]

truth, it calls for cautious scrutiny.[23] Even relationship and enmity or hostility *per se* of the witnesses in a criminal case are not sufficient to discredit their testimony,[24] if the same is otherwise corroborated by circumstances attending the occurrence.[25] In fact, the High Court of Bangladesh asserted that relationship, far from being a ground of criticism, is often a sure guarantee of truth.[26] Relationship by itself does not make a witness interested[27] in the

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[22] Shah Nawaz alias Shano v. The State 1991 P Cr. L J 83 at p. 86 [Peshawar]; Anwar v. The State 1986 P Cr. L J 454 at p. 456 [Lahore]; Asghar Ali v. The State 1985 P Cr. L J 131 at p. 136; Khalid Mahmood alias Babu v. The State 1985 P Cr. L J 1040 at p. 1045 [Peshawar]; Ghulam Sarwar and another v. The State 1985 P Cr. L J 1671 at p. 1674 [Lahore]; Sarfaraz and others v. The State 1984 P Cr. L J 1670 at p. 1675 [Lahore]; Muhammad Akram and another v. The State 1984 P Cr. L J 2362 at p. 2365; Samual Masih v. The State 1983 P Cr. L J 2573 at p. 2575 [Lahore]; Bhai Khan and another v. The State 1983 P Cr. L J Lahore 2498 at p. 2500 [Lahore]; Oghan and another v. The State 1981 P Cr. L J 425 at p. 427 [Karachi]

[23] Ali Nawaz and another v. The State 1988 P Cr. L J 1736 at p. 1743 [Karachi]; Nazim v. The State 1985 P Cr. L J 1951 at p. 1955 [Lahore]

[24] Ahmed v. The State 1980 P Cr. L J 666 at p. 671 [Karachi]

[25] Maulvi Muhammad Jan v. The State PLD 1984 Peshawar 207 at p. 211 reliance is put on Miro and others v. The State 1981 SCMR 1229; Zulfiqar and others v. The State 1983 P. Cr. L. J. 1306 at p. 1310 [Lahore]; Muhammad Afzal v. The State 1983 P Cr. L J 2502 at p.2504 [Lahore]; Bangladesh v. Sakim Halsana and others 39 DLR 1987 HD 187 at p. 192; State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 at p. 1736 [SC (AJ&K)]; Ashiq Mir and 4 others v. The State 1987 P Cr. L J 2101 at p. 2107 [Peshawar]; The State v. Ghulam Muhammad and 2 others 1984 P Cr. L J 1228 at pp. 1232 and 1236 [Quetta]; Muhammad Usman and 6 others v. The State 1984 P Cr. L J 2411 at p. 2417 [Lahore]; Muhammad Arshad and 4 others v. The State 1984 P Cr. L J 3063 at p. 3069 [Lahore] following Wasiullah v. Mirza Ali and others PLD 1963 SC 25; Mauloo and others v. The State 1983 P Cr. L J 1847 at pp. 1850-1 [Lahore] following Mahanda and others v. The State 1981 SCMR 23 and Talib Hussain v. Fazal Hussain and another PLD 1976 SC 518; Muhammad Zaman v. The State 1983 P Cr. L J 719 at p. 722 [Peshawar] following Shamsher and another v. The State etc. 1973 SCMR 69; Muhammad Arif v. The State 1983 P Cr. L J 1275 at p. 1278 [Karachi]; Muhammad Malik v. The State 1981 P Cr. L J 199 at pp. 204 and 207 [SC (Azad J&K)]; Karam v. The State 1981 P Cr. L J 816 at p. 822 [Karachi]

[26] The State v. Miaznul Islam 40 DLR 1988 HD 58 at p. 71

[27] Muhammad Ali and others v. The State 1986 P Cr. L J 1346 at p. 13512 [Lahore]; Muhammad Afzal alias Ajoo v. The State 1985 P Cr. L J 1803 at p. 1807 [Lahore]; Sajjad Hussain v. The State 1985 P Cr. L J 1414 at p. 1418 [Lahore]; Rehana Khatoon v. The State 1985 P Cr. L J 1402 at p. 1409 [Karachi]; Usman v. The State 1984 P Cr. L J 1797 at p. 1802 [Karachi];

legal sense of the definition of interested witness or partisan witness.[28] The reason for accommodating the evidence of relatives is that mechanical rejection of relative-witnesses testimony may lead to failure of justice.[29]

The Lahore High Court in the case of Inayat v. The State[30] attempted to differentiate the issue of a relative from that of an interested witness. It says that there is a difference between a related and an interested witness, because the latter has a motive to implicate falsely. However a witness can both be related as well as be interested. It will depend on the facts and circumstances of each case, and that is why a rule of caution has been propounded by the Courts to seek corroboration. This is a rule of law. Perhaps what Lahore High Court meant to say was more clearly stated in a recent Karachi High Court decision following the Supreme Court and other High Court decisions of Pakistan. It observed that closely related witnesses can be as reliable witnesses as completely unknown and stranger witnesses. The credibility of a witness depends on the

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Hashmat Ali v. The State 1984 P Cr. L J 1237 at p. 1240 [Peshawar]; Maqbool Ahmad and another v. The State 1984 P Cr. L J 1172 at p. 1176 [Lahore]; Muhammad Javed and others v. The State 1984 P Cr. L J 1099 at p. 1104 [Lahore]; Ghulam Muhammad alias Mannan v. The State 1984 P Cr. L J 1866 at p. 1868 [Lahore]; Chakar and another v. The State 1984 P Cr. L J 2407 at p. 2409 [Karachi]; Akbar and another v. The State 1984 P Cr. L J 3108 at p. 3112 [Karachi]; Nasir Ahmad v. The State 1983 P Cr. L J 1039 at p. 1042 [Lahore]

[28] see the definition of Interested witness and Partisan witness in chapters 4.1.1 and 4.1.1.3 respectively; Waqar v. The State 1993 P Cr. L J 323 at p. 327 [Lahore]; Irshad alias Shada v. The State 1992 P Cr. L J 2273 at p. 2277 [Supreme Appellate Court]; Sadiq alias Rehra v. The State 1987 P Cr. L J 2394 at p. 2398 [Lahore]; The State v. Farid alias Kala and another 1988 P Cr. L J 1529 at p. 1536 [Peshawar]; Weram v. The State 1985 P Cr. L J 372 at p. 380 [Karachi]; Abdul Sattar v. The State 1984 P Cr. L J 137 at p. 143 [Karachi]; Leemon and another v. The State 1984 P Cr. L J 2690 at p. 2698 [Karachi]

[29] Shamboo alias Shamir v. The State 1991 P Cr. L J 228 at p. 232 [Karachi]

[30] Inayat v. The State PLD 1987 Lahore 136 at p. 141; Ayub v. The State 1980 P Cr. L J 201 at p. 211 [Peshawar]

nature and the quality of the statement he makes, which should evoke confidence and trust in the mind of the judge. There can be no fixed rule that any person who is closely or distantly related to the complainant/deceased would always be an untrue and interested witness, nor can it be said that any person who is a stranger and is not related to the complainant/deceased will always be a true witness. The relationship and nearness cannot be the only criterion, but it may be an important factor in assessing the worth of evidence and credibility of the statement of the witness. The statement of a witness can be accepted or rejected only after it has been examined thoroughly with reference to the facts and circumstances and the evidence of other witnesses recorded in the case.[31] In the absence of direct enmity or hostility the version of the relatives cannot be discarded.[32] When the relatives come within the definition of

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[31] Muhammad Achar v. The State PLD 1990 Karachi 314 at p. 317 reference is made to 1968 SCMR 1059, 1969 SCMR 302, PLD 1983 SC 401, PLD 1976 Kar 438, PLD 1976 Kar 1205, 1984 P Cr. L. J. 965, 1985 P. Cr. L. J. 1803 and PLD 1988 Lah 557; The evidence of witnesses who are related or close to the deceased should be scrutinised carefully, ref. 1978 SCMR 136; also see Zulfiqar and others v. The State 1983 P Cr. L J 1306 at p. 1310 [Lahore]; Khalid Mahmood alias Babu v. The State 1985 P Cr. L J 1040 at p. 1045 [Peshawar]

[32] Mazhar Masud v. The State PLD 1993 Lahore 293 at p. 296; Faisal Habib v. The State 1993 P Cr. L J 1520 at p. 1531 [Supreme Appellate Court]; Ashiq Hussain alias Muhammad Ashraf v. The State 1992 P Cr. L J 1161 at p. 1165 [Lahore]; Muhammad Latif v. The State 1990 P Cr. L J 1504 at p. 1509 [Lahore]; Farman Ali and others v. The State 1989 P Cr. L J 727 at p. 728 [Lahore]; Muhammad Fazal v. The State 1988 P Cr. L J 1049 at pp. 1053-4 [Lahore]; Nawab v. The State 1987 P Cr. L J 2468 at p. 2475 [Karachi]; Raj Ali and others v. The State 1987 P Cr. L J 1817 at p. 1822 [Lahore]; The State v. Bahadur and another 1987 P Cr. L J 1689 at p. 1699 [Karachi]; Muhammad Ishaq v. 1986 P Cr. L J 2067 at p. 2070 [Lahore]; Nazar Ali and others v. The State 1985 P Cr. L J 560 at pp. 566-7 [Lahore]; Manzoor and 2 others v. The State 1986 P Cr. L J 2672 at p. 2675 [Lahore]; Muhammad Ayub v. The State 1985 P Cr. L J 2014 at p. 2017 [Lahore]; Sabir v. The State 1985 P Cr. L J 2723 at p. 2727 [Lahore]; Muhammad Idrees v. The State 1985 P Cr. L J 865 at p. 868 [Lahore]; Sikander and 2 others v. The State 1984 P Cr. L J 807 at p. 812 [Lahore]; Muhammad Nawaz v. The State 1984 P Cr. L J 1696 at p. 1699 [Lahore]; Usman v. The State 1984 P Cr. L J 1797 at p. 1802 [Karachi]; Muhammad Banaras and another v. The State 1984 P Cr. L J 496 at p. 502

interested witnesses their testimony needs to be scrutinised, and independent corroboration is required.[33] A relative who extends help to the deceased's family soon after the incident cannot be considered to be an interested witness.[34] It is an established principle of law that where the witnesses, although related, are found to be present and having witnessed the occurrence, their testimony can be acted upon with necessary adaptations to the facts and circumstances of the case, supplemental, derogatory or corroboratory so as to expose the persons accused thereof with the commission of the crime.[35]

[Lahore]; Raheem v. The State 1984 P Cr. L J 371 at p. 375 [Karachi]; Hasan Muhammad v. The State, State v. Muhammad Anwar and The State v. Hasan Muhammad 1984 P Cr. L J at pp. 397-8 [AJ&K] or if the evidence is biased or untrustworthy; Muhammad and another v. The State 1984 P Cr. L J 326 at p. 330 [Karachi]; Muhammad Hussain and 4 others v. The State 1984 P Cr. L J 438 at p. 442 [Lahore]; Arshad Mahmood v. The State 1984 P Cr. L J 1827 at p. 1829 [Lahore] decided that similarly husbands testimony cannot be discarded. Muhammad Arshad alias Achhu and 3 others v. The State 1984 P Cr. L J 1703 at p. 1708 [Lahore]; Khalid and another v. The State 1983 P Cr. L J 761 at p. 766 [SC(Azad J&K)] following PLD 1982 FSC 87 and PLD 1982 Lah 141; Rab Nawaz v. The State 1983 P Cr. L J 1507 at p. 1511 [Lahore]; Muhammad Jawaid v. The State 1983 P Cr. L J 2444 at pp. 2448-9 [Peshawar]; Muhammad Ali and 3 others v. The State 1980 P Cr. L J 1069 at p. 1073 [Lahore]

[33]Zubair v. The State 1991 P Cr. L J 2193 at p. 2203 [Karachi]; Falak Sher v. The State 1989 P Cr. L J 2107 at p. 2111 [Lahore]; Muhammad Talib and another v. The State 1988 P Cr. L J 1399 at p. 1405 [Karachi] following Nawaz Ali and another v. The State 1981 SCMR 132; Ibrahim Mollah and others v. The State BLD 1987 AD 248 at p. 255; Arif Khan v. The State 1988 P Cr. L J 1483 at p. 1488 [Lahore]; Muhammad Sharif v. The State 1986 P Cr. L J 637 at p. 643 [Karachi]; Janib and 2 others v. The State 1986 P Cr. L J 583 at p. 593 [Karachi]; Ali Sher v. The State 1985 P Cr. L J 1812 at p. 1817 [Karachi] following Lashkari and 4 others v. The State PLD 1981 Kar. 1 at p. 5; Waryam and another v. The State 1985 P Cr. L J 162 at p. 165 [Lahore]; Muhammad Hussain and 4 others v. The State 1984 P Cr. L J 438 at p. 442 [Lahore]; Asad Azhar v. The State 1984 P Cr. L J 990 at p. 992; Allahdino alias Dino and 3 others v. The State 1984 P Cr. L J 2242 at p. 2246 [Karachi]; Mati-ur-Rehman v. The State 1984 P Cr. L J 2959 at pp. 2964-5 [Karachi]; Sher Dil and another v. The State 1984 P Cr. L J 2997 at pp. 2999-3000 [Lahore]

[34]Muhammad Safdar v. The State 1983 P Cr. L J 1852 at p. 1856 [Lahore]

[35]Rab Nawaz and 2 others v. The State 1986 P Cr. L J 1911 at p. 1917 [Lahore]; The State v. Muhammad Zubair and another 1989 P Cr. L J 2116 at p. 2120 [Peshawar] following State v. Nuran Shah etc. PLD 1967 Pesh. 274 and

A Court would consider the testimony of an injured witness of more value.[36] Injuries on the person of the witness in most cases guarantee the presence of the witness[37] especially if the injuries are not self suffered or self inflicted.[38] If s/he is a relative the judges are reluctant[39] to admit such testimony unless it is corroborated in its entirety.[40] The Court is of the view that injury to witnesses proves their presence but it does not add credence to their testimony.[41] The reasons offered are that closely related witnesses may say anything to embellish or strengthen the prosecution case specially if there existed a difference between the parties due to a litigation beforehand,[42] and as the possibility of self infliction cannot be ruled out.[43] Whether or not the relatives show enmity or not, still precaution is taken in admitting their testimony.

Muhammad Ali v. The State 1985 SCMR 203; The State v. Lal Khan 1992 P Cr. L J 483 at p. 486 [Lahore]; Adho v. The State 1986 P Cr. L J 658 at p. 664 [Karachi]; Muhammad Sarwar and others v. The State 1984 P Cr. L J 1714 at p. 1717 [Lahore]

36 Ataur Rahman and others v. The State 43 DLR 1991 87 at p. 90; Ziaul Hassan and 3 others v. The State 1980 P Cr. L J 531 at p. 543 [Lahore]

37 Riaz Ahmad v. The State 1988 P Cr. L J 522 at p. 526 [Lahore]; Raj Ali and others v. The State 1987 P Cr. L J 1817 at p. 1822 [Lahore]; Sultan Mahmud v. The State 1985 P Cr. L J 1302 at p. 1309 [Lahore]; Ghula and another v. The State 1985 P Cr. L J 801 at p. 802 [Lahore]; Muhammad Ali and others v. The State 1986 P Cr. L J 1346 at p. 1351 [Lahore]; Haji Hamal and others v. The State 1986 P Cr. L J 1121 at p. 1127 [Quetta]

38 Isa and 3 others v. The State 1987 P Cr. L J 1551 at p. 1555 [Lahore]

39 Ghulam Sarwar v. The State PLD 1983 Peshawar 152 at p. 155; Muzaffar Hussain v. The State 1984 P Cr. L J 452 at p. 455 [Lahore]

40 Rehman v. The State PLD 1988 Lahore 643 at p. 648

41 Nabi Bux and another v. The State 1990 P Cr. L J 1018 at p. 1021 [Karachi]; Ashiq Mir and 4 others v. The State 1987 P Cr. L J 2101 at p. 2107 [Peshawar] following Zaab Din and another v. The State PLD 1986 Pesh 188 at p. 192, Said Ahmad v. Zamurd Hussain and 4 others 1981 SCMR 795, Ghulam Sarwar v. The State PLD 1983 Pesh. 152 at p. 157; The State v. Fateh Muhammad and 5 others 1980 P Cr. L J 1245 at p. 1253 [Lahore]

42 Inayat and another v. The State PLD 1983 Lahore 639 at p.646

43 Ghulam Sarwar v. The State PLD 1983 Peshawar 152 at p. 155

The issues of relatives have confronted the Courts so much that rules have been made by case law as to the admissibility of their testimony. The rules are discussed in Ishaq v. State at length. This is a murder case among relatives. The rules are summarised below :

When the eye witnesses are related to the deceased there must be independent corroboration.[44]

When the eye witnesses are inimical and deeply interested, independent corroboration is rule of law.[45]

When the eye witnesses are related to the deceased and inimical towards the accused it would require independent corroboration.[46]

When the eye witnesses are both related equally to the deceased and the accused the rule of independent corroboration is not as important.[47]

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44 Ishaq v. The State PLD 1984 Karachi 595 at p. 601 following on Mangio v. The State 1976 P Cr. L. J 243; Khan Muhammad and 3 others v. The State 1983 P Cr. L J 1253 at pp. 1258-60 [Karachi]

45 Lashkari and 4 others v. The State PLD 1981 Karachi 1; Karim Bakhsh and another v. The State 1985 P Cr. L J 2298 at pp. 2301-2 [Lahore]

46 Muhammad Azam and another v. The State PLD 1983 SC 193; Ghulab and another v. The State 1986 P Cr. L J 1297 at pp. 1302 and 1306 [Karachi]; Talib Hussain and another v. The State 1986 P Cr. L J 1545 at p. 1554-5 [Lahore]; Anwar v. The State 1984 P Cr. L J 1051 at p. 1053 [Karachi] following PLD 1973 SC 321 and PLD 1981 Kar.1; Asad Azhar v. The State 1984 P Cr. L J 990 at p. 992 [Karachi]

47 Muhammad Anwar v. The State PLD 1983 Peshawar 91 at p. 96; Ishaq v. State PLD 1985 Karachi 595; The State v. Lutfor Fakir 24 DLR 1972 (DAC) 217 at p. 221; also see Azim Gul v. The State 1990 P Cr. L J 117 at p. 123 [Peshawar]; State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 at p. 1740 [SC(AJ&K)]; Amjad v. The State 1987 P Cr. L J 1773 at p. 1781 [Peshawar] following Muhammad and others v. The State PLD 1981 SC 365, Amir Hussain Shah and 3 others v. The State PLD 1977 Peshawar 1, Ghulam Hussain v. The State 1974 SCMR 209 and Mubarak v. The State 1982 SCMR 531; Muhammad Saqlain and 3 others v. The State 1985 P Cr. L J 1698 at p. 1704 [Lahore]; Shakar Khan v. The State 1983 P Cr. L J 1105 at p. 1109 [Peshawar]

However, for the safe administration of criminal justice it is always considered proper to search for corroboration from other witnesses of unimpeachable character.[48]

It was observed in Ishaq v. State that the witnesses with close ties with the accused cannot be expected to involve him in false murder charge entailing death penalty; rather it is quite possible that the witnesses bearing such close relationship with the accused would spare no effort to save him even from a true charge, and if need be would go to the extent of perjuring themselves for his sake. It is further observed when close relatives figure as witnesses against the accused, their evidence cannot be lightly dismissed unless a motive of exceptional nature is attributed to them for false implication of the accused. The question is whether the motive attributed to the eye witnesses is so strong that they would not hesitate even to send the accused to gallows. The evidence of a relative against the accused is always regarded as a stronger piece of evidence than the evidence of a non-relative witness.[49]

Some instances from case law are cited to show the grounds for admissibility of testimony of relatives.

In Muhammad Latif v. The State[50] the father was one of the eye witnesses to the injury that resulted in the death of his son. The testimony of the father was rejected as he immediately left for another village and remained occupied there for three days even though his son, in an unconscious state, was admitted in the hospital.

In Khalil Ahmed v. The State[51] reliance was not placed on the

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48 Atta Muhammad etc. v. The State 1980 P Cr. L J 245 at p. 249 [Lahore]

49 Ishaq v. State PLD 1985 Karachi 595 at p. 605

50 Muhammad Latif and 2 others v. The State PLD 1983 Lahore 622 at p. 629 relied on 1968 P Cr. L J 407

51 Khalil Ahmed and 3 others v. The State PLD 1983 Karachi 545 at p. 548

statement of the eye witnesses who were closely related to the deceased and their statements under section 161 of the Code of Criminal Procedure was recorded after a lapse of three or four days with no cogent explanation by the officer in charge. In these two cases the testimonies of the witnesses were not rejected only because they were relatives but also because their actions were not in accord with what people would be expected to do in such circumstances. Their behaviour created doubt in the mind of the judges which in turn affected the probity of the fact.

The above case could be compared to the next one. It would seem that the conviction of the Court as to the innocence of a party, from circumstances arising in each case, is the most important.

In Rasham Khan v. The State[52] the two witnesses are the mother and the nephew of the deceased. They were not termed interested witnesses, as they were found by the Court to have no direct enmity with the appellant to falsely involve him in a case. The Court observed that as the appellant was known to them previously, and being a daylight occurrence they would not have faced any difficulty in identifying them. The assertion of the eye witnesses about a head injury having been caused by the sharp side of hatchet did not fit in with the medical evidence, yet that fact alone did not make their testimony unreliable. It was observed by the Court that in such a fearful and shocking situation, when they themselves have been apprehensive of danger to their own lives, they might not have observed the side of the hatchet used by the assailant in inflicting blows on the deceased. One could argue, however, that if

52Rasham Khan v. The State PLD 1988 Lahore 485 at p. 488

they could have made mistakes regarding one fact, for whatever reason, they could have made mistakes in other details as well.

4.1.1.2 Police Witness

Police officials could be interested witnesses[53] from their zeal towards their duty. They could therefore blur the line between the duty and interest.

It could be said that the office of Muhtasib, Amil al suk or Sahib al suk in the Muslim empires very broadly is similar to the office of police of the present age. The Muhtasibs had the police functions of maintaining public life, controlling the market and the like. They had to be men known for their moral integrity and for their competence in matters concerning the law.[54] It must also be noted that when a regular police force was introduced in British India the Muftis were not agreeable to accept the testimony of the police against the accused, most probably on the ground of influence and interest.[55] Even today, generally the judges are well aware of the intricacy that arises due to over enthusiasm of police officials in

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[53] Gaziur Rahman v. The State 11 BLD 1991 HCD 11 at p. 16 Police evidence is a matter of public concern also in England. see Pattenden, Rosemary, 'Evidence of Previous Malpractice by Police Witness and R V. Edwards' in *Criminal Law Review*, August 1992, pp. 549-57 Zuckerman is of the view that efforts must be made to tackle the problem of miscarriage of justice by aiming to improve the truth value of the police findings. The author examines the legal system of France, Germany, Italy and Scotland in this context. Zuckerman, 'A.A.S. Miscarriage of Justice - a root Treatment' in *Criminal Law Review*, May, 1992, pp. 323-45.

[54] see for details, *The Encyclopaedia of Islam*, New Edition, 1971, on Hisba and Muhtasib, Vol. III, pp. 485-8, also see similar institution of Shurta in, *The Encyclopaedia of Islam*, 1934, Vol. IV, p.393 which is literally translated as police. But it seems Shurta would be more close to the office of a magistrate today in Pakistan and Bangladesh; for more on duties of the Muhtasib see Ibn Taimiya, *al Hisba fi al Islam* translated into English as Public Duties in Islam by Muhtar Holland, Leicester, 1982

[55] Section VIII, Madras Regulation I, 1825; Section I, Madras Regulation VI, 1829

Pakistan. In two decisions from the Federal Shariat Court in 1987 and 1988, it was decided by the Judge that the evidence of a sane adult Muslim cannot be rejected or disbelieved just for the reason that he is in the police department.[56] It was put forward as *obiter dicta* in 1987 that the Islamic law makes specific provisions for the rejection of a witness. Such disqualification is to be specified if a person is to be disqualified. In the 1988 decision it was ruled that if a police officer disqualifies himself as a witness he is not fit to serve as a police official at all. The Judge further pointed out that the disqualification of a Muslim as a witness is a punishment in itself and that this cannot be inflicted without proof of his incurring it.[57] At the same time it was also noted in both the decisions mentioned above that if a person is named as a witness in a number of cases, it cannot be presumed that he is a liar or police tout unless it has been so found by a competent forum.[58] These decisions, although follow the general trend on police witnesses, seem yet to be ambitious of an Islamic society with a police force having the integrity ascribed to the Muhtasib. Though the decision has come from the Chief Justice it was still a case of a Court having the status of a High Court. This rule is obviously not binding in Pakistan. Bangladesh is not confronted with a similar rule.

Other Federal Shariat Court and High Court decisions are in accord with the aim of establishing the truth of fact, rather than the integrity of a person, which coincides with the position of the general law. The testimony of a police officer cannot be excluded

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56 Muhammad Abid v. The State PLD 1988 FSC 111 at p. 112; Sarfaraz Durrani v. The State PLD 1987 FSC 22 at p. 24

57 Sarfaraz Durrani v. The State PLD 1987 FSC 22 at p. 24

58 Sarfaraz Durrani v. The State PLD 1987 FSC 22 at p. 24; Muhammad Abid v. The State PLD 1988 FSC 111 at p. 112

because of his office[59] in the absence of anything adverse against him.[60] The emphasis is on the office, circumstances and motivational credibility rather than the integrity of the police officer. A police official would be believed as to his testimony, especially when it finds support from unimpeachable circumstances,[61] unless it is shown from the contents that he is telling a lie or he has been declared as unreliable by a Court of competent jurisdiction, or he is interested[62] or inimical.[63] If he contradicts himself,[64] or there is no independent evidence to

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[59] Sikandar v. The State 1992 P Cr. L J 97 at p. 99 [Karachi] following Qasim and others v. The State PLD 1967 Kar 233, Javed Ahmad v. The State 1984 P Cr. L J 965 and Muhammad and others v. The State PLD 1981 SC 635; Amanullah v. The State 1992 P Cr. L J 430 at p. 433 [Peshawar]; Daraz Khan and 4 others v. The State 1991 P Cr. L J 68 at p. 73 [Peshawar] following Kamir v. Nazir Ahmad and others 1980 SCMR 791; The State v. Azhar Hussain and another 1987 P Cr. L J 2532 at p. 2544 [Multan]; Dhani Bux v. The State 1980 P Cr. L J 1087 at p. 1092 [Karachi]

[60] Noorul Islam v. The State 1986 P Cr. L J 1818 at p. 1820 [Karachi] following 1976 SCMR 72, PLD 1981 SC 635, 1982 P Cr. L J 543 and 1982 P Cr. L J 399; Mulazim Hussain v. The State 1984 P Cr. L J 989 at p. 990 [Lahore]; Leemon and another v. The State 1984 P Cr. L J 2690 at p. 2696 [Karachi] following State v. Abdul Fattah 1982 P Cr. L J 781; Ilyas v. The State 1981 P Cr. L J 83 at p. 91 [Karachi]; Ali Gul and 3 others v. The State 1980 P Cr. L J 1190 at p. 1198 [Karachi]

[61] Abdul Baqi v. The State 1990 P Cr. L J 145 at p. 151 [Peshawar]; State v. Safdar and another 1989 P Cr. L J 1972 at p. 1978 [Peshawar]; Iftikhar Ahmad alias Ifti and 4 others v. The State PLD 1987 Lahore 492; State v. Mir Nabi Bakhsh Khan Khoso and others 1986 P Cr. L J 1130 at p. 1140 [Quetta] following Muhammad Khurshid v. The State PLD 1960 WP Lah 1202 and Qasim and others v. The State PLD 1967 Kar 233; Bashir and two others v. The State 1981 P Cr. L J 403 at p. 411 [Karachi]

[62] Mati Meah v. State 44 DLR 1992 HD 554 at p. 555

[63] Adam Khan v. The State 1993 P Cr. L J 867 at p. 868 [Lahore]; Raza Muhammad v. The State 1992 P Cr. L J 1299 at p. 1302 [FSC]; Abdul Sattar v. The State 1992 P Cr. L J 212 at p. 219 [Quetta] following Safdar Abbas v. State PLD 1987 SC 467, Khaqan v. State PLD 1992 Lah 341 at 348, Muhammad v. State PLD 1981 SC 635, Muhammad Sharif v. State 1982 P Cr. L J 615, Ghulam Ghous v. State 1983 P Cr. L J 1264, Qalandar Ali Shah v. The State 1984 P Cr. L J 2275 and Muhammad Ismail v. The State PLD 1979 Kar 31; Zulfiqar Ali alias Ditta v. The State 1991 P Cr. L J 1141 at p. 1142 [Lahore]; Wali Muhammad and others v. The State 1985 P Cr. L J 756 at p. 760 [Lahore]

[64] Ghulam Haidar Shah v. State PLD 1988 FSC 38 at p. 41

support his statement,[65] or he is inimical,[66] then his testimony has to be admitted with precaution. If a police official is disbelieved by the Court then cogent explanation has to be offered by it.[67] In other words his veracity has to be accepted or rejected as any other person's[68] subject to test of cross examination.[69]

It is observed by a recent Lahore High Court decision that the reason for accepting the testimony of the members of the police force is the dearth of civic sense in the population and their reluctance to offer themselves as witnesses in criminal cases.[70] It appears as though, ideally, the presence of other witnesses would replace the testimony of the police official. In other words the Court seems to be aware of the fact that the police officials are interested witnesses. The Court failed to observe that people rarely turn up to testify to a fact of criminal nature because of the fear of reprisal as observed in many other cases.[71] This stems from the absence of security that can be offered to a witness and his fear of untoward mishap. This is another reason why, often, relatives and interested witnesses have to be used

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65 Khuda Bakhsh v. The State 1992 P Cr. L J 1158 at p. 1160 [Karachi]

66 Shafique Ahmed v. The State 1991 P Cr. L J 1424 at p. 1427 [Karachi] following Usman v. The State PLD 1978 Kar 593, Rehan v. The State 1976 SCMR 72 and Kamir v. Nazir Ahmed and others 1980 SCMR 791

67 The State v. Muhammad Iqbal and 2 others PLD 1986 FSC 282 at p. 285; for example in Mataro v. The State 1984 P Cr. L J 1724 at p. 1725 [Karachi] the evidence of the investigating officer was considered unreliable due to the suspicious manner in which he conducted the investigation.

68 Munir Ahmad v. State PLD 1986 Quetta 26 at p. 42; Arshad Zubair v. The State 1992 P Cr. L J 1717 at p. 1720 [Lahore]; Wali Muhammad and others v. The State 1985 P Cr. L J 756 at p. 760 [Lahore]; Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 539 [Karachi]; Javed Ahmad v. The State 1984 P Cr. L J 965 at p. 973 [Karachi] following Dhani Bux v. The State 1980 P Cr. L J 1087 and Mir Khan and others v. The State PLD 1968 Kar 903; Arif Hussain and 2 others v. The State 1982 P Cr. L J 543 at p. 548 [Lahore]; Ilyas v. The State 1981 P Cr. L J 83 at p. 91 [Karachi]

69 Naseer Ahmad v. The State 1993 P Cr. L J 1880 at p. 1884 [FSC]

70 The State v. Muhammad Nazir and others PLD 1991 Lah 433

71 Muhammad Haneef and another v. The State 1979 P Cr. L J 1078 at p. 1095 [Lahore]

as witnesses. However in a recent decision the Federal Shariat Court remarked that, if any member of the public chose to be a witness in narcotic trafficking, he runs the risk of his life and property and sometimes his family members, as narcotic trafficking is carried out in the world in a most organised manner.[72] Therefore absence of public witnesses in cases involving narcotics would have no consequences on the prosecution case.[73] It may be mentioned that not only cases involving drug, but all criminal cases, have the same risks as mentioned in the Federal Shariat Court decision.[74]

An example from the Supreme Court of Pakistan seems to be a more balanced decision compared to the Federal Shariat Court decisions of 1987 and 1988 and the rest. It mentions that while proving or disproving a particular case, the objectivity, correct conduct and handling of the issue by the police should not be obscured by their overzealous activities.

Four brothers murdered their sister in the case of Bashir Ahmad v. The State.[75] The murder was witnessed by two police officials. The Supreme Court of Pakistan observed that although the police officials as citizens are as good witnesses in Court proceedings as any other persons, yet, some amount of care is needed when they are the only eye witnesses in a case. This is not because of an inherent

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[72] Zeb-ul-Haram v. The State PLD 1991 FSC 1 at p. 6; similar case Naseer Ahmad v. The State 1993 P Cr. L J 1860 at p. 1866 [FSC]

[73] Muhammad Boota v. The State 1991 P Cr. L J 1990 at p. 1991 [Lahore]

[74] for example see observations made in Muhammad Saeed alias Pupoo and another v. The State 1990 P Cr. L J 1346 at p. 1352 [Lahore]; The State v. Muhammad Zubair and another 1989 P Cr. L J 2116 at p. 2120 [Peshawar]; Abdul Baqi v. The State 1990 P Cr. L J 145 at p. 151 [Peshawar]; Gulab and another v. The State 1986 P Cr. L J 1297 at p. 1306 [Karachi]; Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 538 [Karachi]; see chapter 3.2

[75] Bashir Ahmad and others v. The State PLD 1988 SC 86 at p. 88

defect in their testimony but due to a possibility that individual police officials, in mistaken zeal, reproof a person they believe to be a culprit. Such conviction might smear the lines between duty and propriety. It may be worth noting that in research conducted in Britain and America revealed that the police witnesses are not better witnesses than the ordinary witnesses.[76] It is also observed that the zeal of the police officers to find the guilty may act to influence witnesses' decision in favour of the officers' expectations of guilt.[77] One observation in a Court in Pakistan seems to support the finding of the case study in the west that at times it is safe not to rely on the evidence of the investigating police officials who have been found in many cases to have gone to the length of manufacturing false evidence in their mistaken zeal of discharging their duties in detecting crimes.[78] But on the other hand an investigating officer may be viewed as an interested person who wishes to see that justice is done. He is not necessarily an interested witness within the understanding of its definition.[79]

4.1.1.3 Partisan Witness

It appears from reading various case law that a partisan witness is one who is driven by the bias of enmity and/or interest for a particular party,[80] but generally one who is not related to either party.

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[76] Yarmey, 1979, p. 154

[77] Yarmey, 1979, p. 159

[78] Mian Jan v. The State PLD 1980 Peshawar 92 at p. 99

[79] Arif Khan v. The State 1988 P Cr. L J 1483 at p. 1488 [Lahore]

[80] Muhammad Malook Mangsi v. The State 1986 P Cr. L J 2764 at p. 2768 [Karachi] following Alimuddin v. The State PLD 1982 Lah 141, Shamsher etc. v. The State 1973 SCMR 69, Mushtaque Ahmed v. Siddique Ullah PLD 1975 SC

Most of the jurists in Islamic law agree that enmity between a party and a witness in a case arising out of worldly matters disqualifies the witness.[81] This rule is accepted with qualification, as laid out by the case law in Pakistan, that there is no rigid rule that the evidence of the partisan, interested or inimical witnesses should be rejected in all cases.[82] The question of veracity and reliability of such witnesses is to be examined in the overall circumstances of each particular case for the safe administration of justice, since such witnesses could be witnesses of truth.[83] The Supreme Court of Pakistan in a case of election rivalry cautioned that the partisan witnesses cannot be relied upon without corroborating factual evidences in a particular situation.[84]

It is clear from the case law that independent corroboration is a matter of law to establish the truth of the situation,[85] even if the witness has been injured.[86] The definition of partisan witness and

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61; The definition is derived also by reading other case law mentioned in this sub chapter.

81 Salama, 'General Principles....' 1982 at p.118

82 Muhammad Sharif v. Zulfiqar and 4 others PLD 1991 SC 1090 at p. 1095; Muhammad Rashid Khan v. The State 1984 P Cr. L J 93 at p. 99 (Azad J&K)

83 Iftikhar Ahmad Alias Ifti and 4 others v. The State PLD 1987 Lahore 492 at p. 502 following Miro and others v. The State 1981 SCMR 1229; Muhammad Sharif v. Zulfiqar and 4 others PLD 1991 SC 1090 at p. 1095

84 Muhammad Sharif v. Zulfiqar and four others PLD 1991 SC 1090 at p. 1095; Nazeer and 2 others v. The State PLD 1989 Karachi 466

85 Muhammad Talib and another v. The State 1988 P Cr. L J 1399 at p. 1405 [Karachi]; Sikandar Khan v. The State 1985 P Cr. L J 2000 at p. 2005 [Lahore]; Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at pp. 536-7 [Karachi]; Abdullah v. The State 1983 P Cr. L J 1594 at p. 1599 [Karachi]; Sardar Muhammad and others v. The State 1983 P Cr. L J 1015 at p. 1018 [Lahore]; Khushi Muhammad alias Natho v. The State 1984 P Cr. L J 533 at p. 537 [Karachi]; Ahmad and 2 others v. The State 1980 P Cr. L J 865 at p. 870 [Lahore]

86 Amir Sultan and 9 others v. The State 1985 P Cr. L J 1834 at pp. 1846-7 [Lahore]; Mahram and others v. The State 1981 P Cr. L J 1277(2) at p. 1285 [Lahore]

the reason for rejecting such testimony is shown by giving examples from case law.

In Zaheer v. The State,[87] where there was a murder case preceded by a case of Zina by the other party, the Court found ample oral as well as documentary evidence to the effect that the three eye witnesses to the murder were not only interested but partisan, and the local police had a motive to involve falsely the appellants in this case. Because of this position the Court held that the rule of prudence required independent corroboration of the statements of the prosecution side against the appellants.

In Tajdin v. The State,[88] the brother in law invented the story of Zina with ulterior motives, and named many persons as witnesses but produced only an employee of his uncles. The Court found the employee to be a partisan witness. As the veracity of this witness was discredited he was ruled unreliable.

In the case of Khorshed Alam v. Amir Sultan[89] it was held by the Appellate division of Supreme Court in Bangladesh that the point of disagreement between the parties over a Mutawallishiip (trusteeship) based on the question of legitimacy was so severe that the Court thought it safe to discard the testimony of the witnesses as partisan. It seems that the Court inferred from the circumstances of the case that, because the witnesses were very much biased, they could be considered as partisan.

The evidence of partisan and inimical witnesses who have deliberately perjured themselves on a part of evidence cannot safely

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87Zaheer v. The State PLD 1983 FSC 188 at p. 191

88Tajdin and another v. The State PLD 1986 Lahore 142 at pp. 146-8

89Khorshed Alam v. Amir Sultan Ali Hyder and another 38 DLR 1986 AD 133 at p. 146

be relied upon in respect of the other part of the evidence without any confirmatory evidence[90].

4.1.2 Independent Witness

The orthodox approach of fact finding in the empirical sense is in practice in the Courts of Pakistan and Bangladesh. A system has evolved whereby, if the Court is uncertain, it must give more weight to the testimony of an independent and/or natural witness than an interested and/or a chance witness.

An independent witness is a person who is not associated with the fact in issue and who does not have any motive to implicate the accused falsely.[91] This would mean a person who has witnessed the fact without himself getting involved at great length, so as not to be accused of having partiality. In one case a disinterested relative is termed as an independent witness.[92] Also, an independent witness is often referred to as public person.[93] It seems that a relative could be a disinterested witness and in rare cases independent, where he may be oblivious of the situation. Still the rule of admitting the testimony of a relative mentioned above should apply before s/he can be declared independent.

The case law clarifies the rules concerning persons who are to be considered independent witness by the Courts. In theory, it appears from the case law that for independent witnesses, corroboration is a rule of precaution adopted by precedent. The corroboration required of an independent witness should not be subjected to the same

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90 Ali Asghar Khan v. The State 1983 P Cr. L J 238 at p. 246 [SC(AJ&K)]

91 Muhammad Ashraf v. State PLD 1984 Lahore 378 at p. 382

92 Johardin v. State PLD 1989 Peshawar 237 at p. 240 also see case law in chapter 4.1.3

93 Muhammad Suhail v. The State PLD 1988 FSC 26 at p. 28

scrutiny as that of an interested witness which is discussed above. It seems that the honesty and accuracy of an independent witness may be questioned since s/he does not have any *mens rea.* Therefore an independent witness may be considered as potentially unreliable due to cognitive credibility.[94] Judicial scrutiny is carried out to find out the veracity of the statement only.

In Muhammad Suhail v. The State,[95] a raid party for recovery of heroin had gone to the place of the accused without a member of the general public, and the recovery witnesses were under the influence of the police. They had no explanation why the provisions of law, i.e. section 103 of the Code of Criminal Procedure were not followed. There were contradictory statements regarding recovery of narcotics. The Federal Shariat Court observed that only a proper raid witnessed by a magistrate or independent and reliable witnesses would have stood the test of judicial scrutiny and it would not be safe to act upon the testimony of the officials who acted as guided by the police officer.

In Muhammad Ijaz v. The State,[96] the father of the deceased, one of the eye witnesses to the murder, was corroborated by an independent natural witness and circumstantial evidence. Without any motive to falsely implicate the accused and with no affiliation with the deceased the independent witness was considered not an interested witness. The word used by the Court was connection for affiliation. It is not clear what the judge meant by connection. It

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[94]Developed by reading Elliot, 1987, pp. 159-68; Dennis, Ian, 'Corroboration Requirements .....' 1984, pp. 316-336 at p. 319; also see chapter 4.1.1

[95]Muhammad Suhail v. The State PLD 1988 FSC 26 at p. 28; see chapter 4.2.3

[96]Muhammad Ijaz alias Jajji and another v. The State PLD 1988 Lahore 676 at p. 679

could mean any kind of affiliation including friendship, relationship or normal neighbourly behaviour.

In Iftikhar Hussain v. The State,[97] it was held that for an independent and disinterested witness whose testimony stands corroborated by medical evidence and whose veracity is proved, his status does not change only because he had appeared as a witness in some robbery case on behalf of the complainant. This is a clear case where establishing the truth of the case is more important than the nature of the person. The independent witness is considered disinterested without digging out whether he was partisan in the previous case or not.

Independent and disinterested witnesses are not disbelieved.[98] The reason for the Courts insisting upon independent witness and evidence is to eliminate the chances of false implication as there is an unfortunate tendency prevalent in the society to involve innocent persons.[99]

4.1.3 Natural Witness

A probative value of a natural witness lies most probably with the level of his/her perceptive ability. The witness who are inmates of the house[100] or who lives close to the place of occurrence[101] or is

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97 Iftikhar Hussain and another v. The State PLD 1983 Peshawar 37 at p. 43 relied on Mumtaz-ud-Din v. The State PLD 1978 SC 114

98 Amira and others v. The State 1985 P Cr. L J 2864 at p. 2870 [Lahore]; Tariq Aziz etc. v. The State 1982 P Cr. L J 396 at p. 402 [Lahore]

99 Umar Hayat and others v. The State 1992 P Cr. L J 2427 at p. 2431 [Lahore], it is true for both the society in Pakistan and Bangladesh.

100 Riaz Ahmad v. The State 1988 P Cr. L J 522 at p. 526 [Lahore]; Salar Khan v. Muhammad Ayub and 2 others 1986 P Cr. L J 1482 at p. 1486 (Azad J&K) following PLD 1969 SC 552, 1969 SCMR 822, 1970 SCMR 432 and 1984 SCMR 1; Shamshad Hussain alias Shada v. The State 1985 P Cr. L J 2494 at p. 2497 [Lahore]; Muhammad Shafi Khan v. The State and 5 others 1985 P Cr. L J 1539 at p. 1543 [Karachi]; Weeram v. The State 1985 P Cr. L J 372 at p. 378

present in the natural course of events[102] or business[103] is a natural witness. For example, a passer-by is considered a natural witness when the incident takes place on a road,[104] or shopkeepers are considered natural witnesses when the incident takes place in a shopping area.[105] An injured witness because of his proved presence at the place of occurrence is also considered a natural witness.[106] When the presence of the witnesses at the time of occurrence does not run counter to the natural probabilities, that person can be termed as a natural witness.[107] It will require corroboration if the record suggests that there is motive to falsely implicate the accused appellants.[108] A natural witness may or may not be a relative. It is a matter of common sense to admit the testimony of a natural witness. Regarding relatives, the Courts seem to be in a constant process of evaluating rules to accept this category

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[Karachi]; Zahoor alias Zahoor Hussain and 9 others v. The State 1983 P Cr. L J 992 at p. 1000 [Lahore]; Muhammad Nawaz v. The State 1982 P Cr. L J 458 at p. 462 [Lahore]; Kamaluddin v. The State 1981 P Cr. L J 137 at p. 142 [Karachi]

101 Mulazim Shah v. The State 1990 P Cr. L J 431 at p. 435 [Peshawar]; Munir Ahmad v. State PLD 1986 Quetta 26 at p. 44; Muhammad Ishaq v. The State 1986 P Cr. L J 2067 at p. 2070 [Lahore]; Sajjad Hussain v. The State 1985 P Cr. L J 1414 at p. 1418 [Lahore]; Muhammad Iqbal v. The State 1984 P Cr. L J 456 at p. 460 [Lahore]; Manzoor Ahmad v. The State 1984 P Cr. L J 1836 at p. 1839 [Lahore]

102 Ishaq v. The State PLD 1985 Karachi 595; Iftikhar alias Nanna v. The State 1985 P Cr. L J 2719 at p. 2722 [Lahore]; Abdul Majid v. State PLD 1984 Lahore 450 at p. 455

103 Mulazim Shah v. The State 1990 P Cr. L J 431 at p. 435 [Peshawar]; Johardin v. State PLD 1989 Peshawar 237 at p. 240; Jahangir Khan v. The State 1987 P Cr. L J 191 at p. 194 [Lahore]; Khalid Javed Gilan and another v. The State 1984 P Cr. L J 100 at p. 106 [Lahore]

104 Ghulam Hussain v. The State 1983 P Cr. L J 2382 at p. 2386 [Lahore]

105 Abdur Rehman v. The State 1983 P Cr. L J 2462 at p. 2467 [Peshawar]

106 Ayub and 2 others v. The State 1991 P Cr. L J 1535 at p. 1548 [Lahore]

107 Muhammad Afzal alias Ajoo v. The State 1985 P Cr. L J 1803 at p. 1807 [Lahore]

108 Muhammad Latif and 2 others v. The State PLD 1983 Lahore 622 at p. 629; Arshad alias Ashraf v. The State 1985 P Cr. L J 1728 at p. 1731 [Lahore]; Riaz-ud-din Jauhar v. The State P Cr. L J 1849 at p. 1856 [Lahore]

of natural witnesses. The Courts usually look for corroboration for the natural witnesses who are also relatives.[109]

Some examples would clarify whom the Court considers as a natural witness and the circumstances in which they could be relied upon. The Supreme Court of Pakistan held in the case of Habibur Rahman Khan v. Mustafa Abbas[110] that the informant is a natural witness because the deceased was living with him and the occurrence of murder took place not far from their home. Although the witnesses were related to the deceased, their mere relationship in the circumstance would not make them interested witnesses when they had no motive to falsely implicate the respondents.

In Johardin v. State,[111] the father of the deceased was considered a natural witness as he was the owner of the place where the deceased was stabbed in the chest resulting in his death. The time of incident, at 10.30 a.m., made him a natural witness present on the spot. The other witness, though related to the deceased, was *also*[112] considered by the Court as an independent witness since he had no enmity toward the appellant. Both were ruled totally disinterested witnesses. From the word *also* it seems that the father was considered to be an independent witness by the Court.

In Salim Khan v. State,[113] the prosecution placed reliance on the eye witness account furnished by the brother, the mother and another woman, an inmate of the house of the deceased. It would appear from

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109 Tanwir Ahmad and 4 others v. The State 1985 P Cr. L J 1394 at p. 1400 [Lahore]; Riasat Ali v. The State 1984 P Cr. L J 1295 at p. 1295 [Karachi]

110 Habibur Rehman Khan v. Mustafa Abbas PLD 1989 SC 20 at p. 25; similar decision in Muhammad Nawaz v. The State 1982 P Cr. L J 458 at p. 462 [Lahore]

111 Johardin v. State PLD 1989 Peshawar 237 at p. 240; also see chapter 4.1.2

112 emphasis supplied

113 Salim Khan v. The State PLD 1985 Peshawar 136 at p. 140

the discussion of the case that the Court found all the witnesses as natural and by corroborating their statements with the available evidence as trustworthy.

In Hashmat Ali v. The State,[114] the two witnesses to the murder were the informant who was the brother of the deceased, and a natural witness whose home was fifteen yards away from the place of occurrence. They both corroborated the statements of each other. They had no previous enmity with the appellant. The Court held that a natural witness, simply because he reneged on his statement in another case, would not be considered a liar for all times to come. It led the Court to be cautious, but the witness stood the test of scrutiny and therefore his evidence could not be ignored. Here an independent person was considered a natural witness, but the Court was quick to point out that the truth of the fact, rather than the integrity of the person is more important.

In Gulla v. State,[115] the ocular evidence of a double murder consisted of the statements of the sister of one of the deceased and the statements of a neighbour. The sister's presence was considered natural, as after she was deserted by her husband she was living with her brother. The presence of the neighbour who was ploughing the land and followed the assembly of accused out of curiosity also was considered to make him a natural and not a chance witness. The eye witnesses were further corroborated by the circumstantial evidence in the form of recovery of blood stained earth, dresses, etc.

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114 Hashmat Ali v. The State PLD 1985 Lahore 409 at p. 413; In Muhammad Amin v. The State 1984 P Cr. L J 1681 at p. 1684 also a relative who was a natural witness was corroborated by another natural witness about the incident.

115 Gulla and 11 others v. State PLD 1982 Lahore 205 at pp. 208-9

The testimony of natural witnesses does not require corroboration if they are also proved to be disinterested,[116] although it is seen from the above cases that Courts do look for corroborative evidence.

4.1.4 Chance Witness

A person deposing before Court is termed as a chance witness when he claims to be at the place of occurrence by chance or coincidence at the time when the offence was committed.[117] He may not be a resident of the area nor has he any business to be there and cannot be expected in the area in normal circumstances.[118] Whether a particular witness is a chance witness would depend upon the circumstances of each case; a person may be a chance witness in his own house at the time when he is supposed to be present on duty.[119] He may be a person who was in the eye of law not present at the time of occurrence.[120] Relatives with ulterior motives may be judged as chance witnesses by the Court[121] and therefore require independent corroboration.[122] The Appellate Division of the Supreme Court of Bangladesh in a recent decision of 1991 is of the view that the evidence of such a witness need not be rejected outright, but is to be treated with caution and may be viewed with

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116 Kaleem Ahmed v. The State PLD 1993 Karachi 13 at p. 17

117 The State v. Shafiqul Islam @ Rafique and another 11 BLD 1991 AD 121 at p. 124; Niamat Khan v. The State 1984 P Cr. L J 1201 at pp 1206-7 [Lahore]

118 Muhammad Younas v. The State 1993 P Cr. L J 910 at p. 913 [Lahore]; Karim Bakhsh and 2 others v. The State 1990 P Cr. L J 814 at p. 817 [Lahore]; Leemon and another v. The State 1984 P Cr. L J 2690 at p. 2697 [Karachi]; In Nasir Ahmad v. The State 1983 P Cr. L J 1039 at p. 1042 [Lahore] it was decided that witnesses from the locality going to the mosque for evening prayer cannot be termed as chance witnesses.

119 Javed and 2 others v. The State 1991 P Cr. L J 2049 at p. 2053 [Karachi]

120 Muhammad Jawaid v. The State 1983 P Cr. L J 2444 at p. 2449 [Peshawar]

121 Talib v. The State 1985 P Cr. L J 2025 at pp. 2028-9 [Karachi]

122 Rab Nawaz v. The State 1986 P Cr. L J 2864 at p. 2866 [Lahore]

suspicion if the witness is partisan or inimically disposed towards the accused, or if the reason given by the witness for his being present at the place of occurrence appears to be untrue.[123] But if it seems that their presence is improbable in the given circumstances, such witnesses can be disbelieved.[124] Evidence of such witnesses is to be weighed and assessed in the circumstances of each case.[125] The elaborating point on this would be the Supreme Court decision of Pakistan, of the same year. It laid down that if the explanation regarding the presence of a chance witness at a relevant place was accepted then the stigma of his being a chance witness would lose significance[126] Therefore, as was made clear by a High Court decision of Pakistan earlier, there is no universal rule that the evidence of a chance witness should always be viewed with mistrust and rejected as unworthy of credit. It depends upon facts and circumstances of each case. [127]

An example with reason for rejecting chance witness is cited.

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123 The State v. Md. Shafiqul Islam alias Rafique and another 43 DLR 1991 AD 92 at p. 94; similar cases Nausher Mollah and others v. The State 11 BLD 1991 HCD 295 at p. 30; Mumtaz Khan v. The State 1984 P Cr. L J 407 at p. 410 [Lahore]; Muhammad and another v. The State 1984 P Cr. L J 326 at p. 329 [Karachi]; Muhammad Anwar v. The State 1984 P Cr. L J 1069 at p. 1070 [Lahore]

124 Allah Bakhsh v. The State 1985 P Cr. L J 2152 at p. 2155 [Lahore]

125 Bashir v. The State 1985 P Cr. L J 1987 at pp. 1990-1 [Lahore]; Yusaf and 6 others v. The State 1984 P Cr. L J 684 at pp. 690-1 [Lahore]; Muhammad Banaras and another v. The State 1984 P Cr. L J 496 at p. 501 [Lahore], it requires independent corroboration.

126 Riasat Ali and another v. The State PLD 1991 SC 397 at p. 399; similar cases Muhammad Hanif and 4 others v. The State 1987 P Cr. L J 440 at p. 445 [Lahore]; Sabir v. The State 1985 P Cr. L J 2723 at p. 2727 [Lahore]; Muhammad Safdar v. The State 1983 P Cr. L J 1852 at p. 1855 [Lahore]; Allah Bakhsh v. The State 1983 P Cr. L J 1894 at p. 1898 [Lahore]; Mehar Din and others v. The State 1982 P Cr. L J 422 at p. 429 [Lahore]; Abdullah Khan v. The State PLD 1980 Peshawar 250 at p. 255

127 Ishaq v. The State PLD 1985 Karachi 595 at p. 602

In Nazeer v. The State,[128] the murder took place in a thickly populated area. Nobody was examined on behalf of the prosecution from amongst those who were natural witnesses, and instead the persons who happened to be present at the spot by chance were brought forward as eye witnesses. The Court observed that when it has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence.[129] Where the prosecution produces chance witnesses with a background of enmity, instead of natural witnesses, or where a chance witness takes extraordinary interest in a case without any guarantee of his presence at the time of incident, such evidence has to be discarded in such circumstances.[130] It seems that if natural witnesses are present, the chance witnesses, with or without enmity, lose significance unless the same are considered for corroborating the natural witness.

4.1.5 Hostile Witness

There is no word for hostile witness in Islamic law although in essence it is recognised. Retracting of testimony, reneging on a statement, or a witness being called by one party testifying for the other party is accepted in practice for establishing the truth of the fact of each case.[131]

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128 Nazeer and 2 others v. The State PLD 1989 Karachi 466

129 Nazeer and 2 others v. The State PLD 1989 Karachi 466 relied on Sikandar v. The State PLD 1963 SC 17 and Thoba and another v. The State PLD 1965 SC 40

130 Nazeer and 2 others v. The State PLD 1989 Karachi 466 citing Sikandar v. The State PLD 1963 SC 17; Muhammad Hanif v. The State 1980 P Cr. L J 345 at p. 348 [Lahore]

131 see chapters 2.1.2.3 and 5.1.3

There is also no term for hostile witness in the Qanun-e-Shahadat or in the Evidence Act. The word is recognised by precedent only. Article 150 of the Qanun-e-Shahadat and section 154 of the Evidence Act lay down that the Court might at its discretion allow a party to question his own witness. The case law on this point is that a person who materially reneges on the statement he made to the police at the first instance is a hostile witness.[132] His testimony has to be accepted for limited purposes and not the material part of the incident.[133] The statement made by Courts at times, that the evidence of a hostile witness normally loses all the evidentiary value,[134] and cannot be used for or against the party,[135] is not correct. The evidence of a witness declared hostile must be considered along with other evidence on record[136] corroborated by independent evidence.[137] A witness is not necessarily hostile, and need not be declared hostile,[138] if in speaking the truth as he knows it or sees it, his

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[132] Muhammad Nawaz v. The State 1984 P Cr. L J 1696 at p. 1699 [Lahore]

[133] Abdul Ghani v. The State PLD 1982 Lahore 154 at p. 161; Abdul Rehman v. The State 1988 P Cr. L J 1523 at pp. 1527-8 [Peshawar]; State v. Muhammad Aziz Khan 1983 P Cr. L J 29 at p. 32 Shariat Court (AJ&K)

[134] Ghulam Rasul v. The State 1982 P Cr. L J 720 at p. 723 [Lahore]; Talib Hussain and 2 others v. The State 1982 P Cr. L J 635 at p. 640 [Lahore]

[135] Rab Nawaz v. The State 1986 P Cr. L J 2864 at p. 2866 [Lahore]

[136] Abdul Ghafoor v. The State 1991 P Cr. L J 752 at p. 756 [Karachi]; Faiz Muhammad and 2 others v. The State 1986 P Cr. L J 973 at pp. 978-9 [Lahore]; for example in Kadir Bakhsh v. The State 1985 P Cr. L J 2375 at p. 2384 [Quetta], it was observed that if the Court finds a hostile witness to be a natural witness of the fact, the Court can rely upon the part of the testimony that appears to be true; Roshan v. The State 1985 P Cr. L J 2312 at p. 2317 [Karachi] following Zarid Khan v. Gulsher and other 1972 SCMR 597; S.M. Farooque alias Syed Farooque v. The State 28 DLR 1976 HD 192 at p. 195

[137] Abdul Wahab and another v. The State BLD 1986 HCD 390 at p. 395; Muhammad Ismail v. The State 1985 P Cr. L J 713 at p. 719 [Karachi] following Kaloo and 2 others v. The State 1973 P Cr. L J 334; Saffar and another v. The State 1982 P Cr. L J 826 at p. 834 [Karachi]

[138] Yunus Ali and others v. The State BLD 1983 HCD 121 at p. 130; Yunus v. State 34 DLR 1982 HD 208 at p. 213 following Profulla Kumar Sarkar and others v. Emperor AIR 1931 Calcutta F.B. 401

testimony happens to be against the party calling him.[139] The favourable evidence of a prosecution witness in favour of the accused is admissible, and he is not to be declared hostile.[140] If an independent,[141] or a disinterested,[142] or an important witness,[143] or an eye witness,[144] is not produced for examination the conclusion is, were he produced, he would not have supported the prosecution. The judges in Pakistan and Bangladesh remind that although it is a good reason for the prosecution not to produce some witnesses who would turn hostile,[145] this practice would be unfair if the sole reason were to conceal the truth.[146]

Research in America indicates that the more accurate witnesses were often those who after interrogation said they wanted to change the testimony they had given in their free reports. In other words, their interrogation apparently caused them to reconsider or re-evaluate their earlier statements.[147] There is no such research in

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139 Siddique Munshi v. The State 12 BLD 1992 AD 59 at p. 62=44 DLR 1992 AD 169 at p. 172; Iftikhar Ahmad alias Bobi and another v. The State 1991 P Cr. L J 488 at p. 496 [FSC] ; Amir Khan v. Malik Sher Jan and another PLD 1984 Quetta 146 at p. 151; S.M. Farooque alias Syed Farooque v. The State 28 DLR 1976 HD 192 at p. 195

140 State v. MM Rafiqul Hyder 45 DLR 1993 AD 13 at p. 19

141 State and 5 others v. Muhammad Akram and 5 others 1987 P Cr. L J 1728 at p. 1740 [SC (AJ&K)]; Aklas Mia and others v. The State 25 DLR 1973 HD 398 at p. 403

142 Khalid Mahmood alias Babu v. The State 1985 P Cr. L J 1040 at p. 1049 [Peshawar]; Mian Jan v. The State PLD 1980 Peshawar 92 at p. 99

143 Lalu @ Lal Miah v. The State 11 BLD 1991 HCD 1 at p. 7; Gaziur Rahman v. The State 11 BLD 1991 HCD 11 at p. 17; Abdul Bahar @ Abdul Bahar and others v. The State BLD 1985 HCD 84 at p. 92; S.M. Farooque alias Syed Farooque v. The State 28 DLR 1976 HD 192 at p. 195-6

144 Javed Ahmed v. The State 1984 P Cr. L J 965 at p. 973 [Karachi]; similar conclusion would be drawn if a close relative who is acknowledged to be an eye witness is not produced as in Basara and 2 others v. The State 1990 P Cr. L J 311 at p. 317 [Lahore]; or if a prosecution witness is not produced as in Allah Bakhsh v. The State 1988 P Cr. L J 89 at p. 94 [Lahore]

145 Shadat Ali and another v. The State 44 DLR 1992 HD 217 at p. 221

146 Mohd. Nawaz v. State PLD 1979 BJ 42 at p. 48

147 Marshall, 1980 p. 109

Pakistan and Bangladesh. It is possible to come to a conclusion similar to the research done in America. In Ali Gul v. The State,[148] it was ruled that a witness need not always be disbelieved if he repudiates his first statement. Each statement has to be weighed against the circumstances of each case. Often a person is declared hostile when in fact he tries to give a more authenticated version. It is not necessarily an improvement to make concessions for any party.[149] But it may also be pointed out from personal experience gained from chamber practice[150] that in cases where a hostile witness testifies, often the parties agree out of Court to close the case, either due to delay in the procedure of the Court, or high expenses incurred by the parties, or inconveniences in appearing to the Court from time to time, intimidation by the adverse party. Moreover, in criminal cases parties cannot ask for compromising the case, as the State takes over the position of one of the parties, i.e. the prosecution. The parties hence reach at a compromise, specially in criminal cases, out of Court. Due to the testimony of a hostile witness the case remains unproved as it results in insufficient evidence. The statute or the case law does not differentiate between an adverse witness and a hostile witness in the way English law does. An adverse witness is an unfavourable witness to the party who calls him. A hostile witness wilfully refuses to testify truthfully for the party calling him. An adverse witness cannot be cross examined whereas a hostile witness can be cross examined by the leave of the Court.[151] A party may challenge the ability desire or propensity to tell the truth

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[148] Ali Gul and 3 others v. The State 1980 P Cr. L J 1190 at p. 1196 [Karachi]
[149] Abdul Rehman v. The State 1988 P Cr. L J 1523 at p. 1527 [Peshawar]
[150] see chapter 1.4
[151] Jowitt, 1977, Vol. I, pp. 60 and 923

of his own witnesses. A witness becomes hostile when in the opinion of the judge he bears a hostile *animus* to the party calling him and so does not give his evidence fairly and with a desire to tell the truth.[152] The concepts of hostile witness and adverse witness in English law are combined in the concept of the hostile witness in the case law of Pakistan and Bangladesh.

An example from case law would elaborate the position of hostile witness. It seems that the judge is always mentally working to differentiate between a truthful hostile witness with a false one, i.e. adverse witness and hostile witness respectively, from the angle of the English legal system. Abdul Ghani v. State[153] is a murder case resulting from bitter matrimonial relationship. The informant's evidence at trial was corroborated on all material points by his first information report. It was when he mentioned two names different from those he mentioned in the first information report as the assailants of the deceased that he was declared hostile by the prosecution. In a similar case, the Appellate Division of Supreme Court of Bangladesh ruled that, considering the evidence of the hostile witness as a whole, which had been a corroboration of the prosecution case, he need not have been declared hostile outright, but that he could have been cross-examined by the prosecution with the Courts permission[154] to ascertain the truth of the fact.[155]

There is hardly any case where a witness is challenged under the provisions of the Penal Code for giving false evidence, whether he is declared hostile or not. Under article 151 of the Qanun-e-Shahadat

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[152]Seabrooke, 1981, p. 13

[153]Abdul Ghani v. State PLD 1982 Lahore 154 at p. 160

[154]Nausher Ali Sarder v. The State 39 DLR 1987 AD 194 at p. 198

[155]Amir Khan v. Malik Sher Jan and another PLD 1984 Quetta 146 at p. 151
Muhammad Ashraf v. The State 1991 P Cr. L J 2274 at p. 2275 [Lahore]

read with article 140 and under section 155 of the Evidence Act read with section 145, the credit of a hostile witness could be impeached by proof of formal statement made by him.[156] It must be shown that the statements made by him was due to enmity. In the absence of the allegation of enmity the prosecution is not entitled to impeach the credit of his own witness. The statement may rather be treated as an admission on the part of the party itself.[157] Therefore either parties can make use of a hostile statement[158] depending on the presence or absence of the element of animosity of the hostile witness. A witness even if declared hostile can be relied on if in considering his entire evidence, the Court is satisfied about the credibility of the witness.[159] The Lahore High Court, as *obiter dicta*, in the above mentioned case of Abdul Ghani, strongly deprecated the tendency of police officers to file major offences against persons who *prima facie* do not appear to have committed the same. It observes that such a tendency not only compels disinterested witnesses to renege on their statements to shield innocent parties from being saddled with major punishments, but directs the mind of the judges in the wrong channels or influences them to form wrong impressions, which would otherwise not happen.

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[156] Abdul Rehman v. The State 1988 P Cr. L J 1523 at p. 1527 [Peshawar] following Abdul Ghani v. The State PLD 1963 (W.P.) Lah 445 and Nadar Khan and another v. The State 1984 SCMR 979

[157] Iftikhar Ahmad alias Bobi and another v. The State 1991 P Cr. L J 488 at p. 496 [FSC]

[158] Attar v. The State 1984 P Cr. L J 1180 at p. 1181 [Lahore]

[159] Md. Shah Alam and others v. The State BLD 1985 AD 198 at p. 200

4.1.6 Trap Witness

The case law recognises the term decoy or trap witness. This, as a concept of law, is not recognised by Islamic law. Because of the tough requirement of proof beyond reasonable doubt, the laying of a trap is perhaps the only method recognised by the Courts of Pakistan and Bangladesh for detection of crimes like bribery, committed in a covert manner. Trap witnesses should always be an independent witness. It appears that a relative, even if he an independent witness, cannot be a trap witness.

In a recent decision it was held by the Appellate Division of the Supreme Court of Bangladesh that such a method of laying a trap, is not prohibited in investigation of crimes. The identification officer cannot be said to be thereby investigating or promoting the commission of offence. It goes on making a departure from an earlier High Court decision of Pakistan, that although in the case of accomplice evidence, the rule of prudence is that conviction based on such evidence is to be corroborated in all material particulars, this principle cannot be extended to the evidence of trap witnesses because the latter cannot be termed as accomplices. The Court says as *obiter dicta* concerning corroboration of trap witnesses that no hard and fast rule or guidance can be given. There may be cases as in Noor Muhammad v. The State where the Court looked for independent corroboration. Equally there may be cases where the Court may accept the evidence of the trap witnesses.[160] But the trend of case law decided by the High Court of Bangladesh is that corroboration from independent and neutral witnesses is very much necessary in

160 Shahabullah v. The State 43 DLR 1991 AD 1 at p. 3 relied on Noor Muhammad v. The State 15 DLR SC 7

trap cases. The reason is the members of police trap party and the decoy witness, however public spirited and well intentioned they may be, are expected to be united at least in one common desire to see that the trap is not an exercise in futility and does not end in a fiasco.[161]

The Lahore High Court in an earlier decision, after discussing at length the nature of the trap witness, asserts that corroboration is a must for this kind of witness. It says : a complainant in a trap case lays information about the illegal demand to receive illegal gratification and becomes a decoy witness because such witness allures, entraps, or lures into a trap, a person who demands such illegal gratification, for being apprehended by the law enforcing agency. Since such person has the exclusive knowledge, regarding the demand of illegal gratification, it would be difficult to consider such witness as an accomplice.

The Court defines that an accomplice is a guilty associate, and because of the presence of *mens rea* and his participation in the crime, he can be tried along with his associates. Applying the criteria of *mens rea* the Court continues to show the difference between an accomplice and a trap witness. A decoy witness in the bribe case is not an accomplice in the strict sense because in a way he is rendering useful service by laying such information with the law enforcing agency for upholding the supremacy of law. Regarding the rule of corroboration in the case of the decoy witness, it says, contrary to the Supreme Court case in Bangladesh stated above, that the golden rule to seek corroboration is a *sine qua non*

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[161] AKM Mukhlesur Rahman v. The State 45 DLR 1993 HD 626 at p. 631; Abdul Jabbar v. The State 37 DLR 1985 HD 278 at p. 284

(without which it could not have happened) for the conviction. Though a decoy witness is not an accomplice, yet the rule of law for judging the credibility of the testimony of an accomplice laid down in section 133 read with illustration (b) to section 114 of the Evidence Act is strictly applicable.[162]

A trap witness should be independent. If a trap or decoy witness is facing departmental enquiry or is dismissed from service on a corruption charge, he is not accepted as a reliable witness.[163] In raid cases, the Court of Pakistan insists on the raiding magistrate to witness the receiving of tainted currency notes.[164] A decision of the Lahore High Court in the case of Shamshad Ahmad v. State,[165] shows the precaution taken by the judge for not admitting the testimony of prosecution witnesses, because of not having trap witness. In a scheme of land allotment where a bribe was alleged to have been taken by public officials, the Court did not accept the prosecution story regarding the payment of money in the absence of any trap raid by independent witness or the magistrate although the prosecution witnesses were neither related to each other nor inimical to any of the appellants, nor had any motive falsely to implicate them. Rather the Court made the observation that it cannot be ruled out that the story of bribe giving is set up at the instance of police, and the petitioners subscribed to the view to save their own skins, since they had been convicted for being involved in producing a forged letter allotting them land. It is also possible that the whole set-up of the bribe and the forged document was the doing

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162 Hafazat Ali Shah v. The State PLD 1984 Lahore 494 at pp. 498-9 relying on Emperor v. Anwar Ali AIR 1948 Lah 72

163 Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 87 [Karachi]

164 Saeed Ahmad v. The State 1985 P Cr. L J 2985 at p. 2986 [Lahore]

165 Shamshad Ahmad v. State PLD 1982 Lahore 321 at pp. 325-6

of the appellants. As the eye witnesses did not come at an early date to complain against the appellants, but only when an enquiry was initiated to trace out the culprits, the testimony could only be accepted with reservation.

The High Court of Bangladesh on the other hand disapproved of the practice of involving magistrates in trap parties arranged by the police because the independence of the judiciary is to be safe guarded at all costs. The magistrate, by participating in trap cases, reduces himself to the position of an ordinary witness.[166] .

4.2 Characteristics of a Witness stated in the Statute

Different characteristics of witnesses such as interested witness, natural witness, independent witness etc. has evolved by the Court practices identifying each witness within a certain category. There are various reasons that could be ascribed to witnesses for their behaviour. But to attribute any one reason would not suffice as is evident from the above discussion and examples of cases. The following subchapter regarding the characteristics of a witness is more defined than the one discussed above. But within the category of those defined characteristics the Court evaluates the witnesses in terms of undefined characteristics discussed in the above subchapter.

The statutes deal with certain witnesses although the name conferred upon them is by case law. A privileged and an expert

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[166] Abdur Rahman v. State 27 DLR 1975 HD 268 at pp. 275-7 following Rao Sahib Bahadur Singh and another v. The State AIR 1954 (SC) 322 at p. 355, Nazir Ahmed v. Emperor AIR 1936 (PC) 253 at p. 258 and MC Mitra v. The State AIR 1951 Cal. 524

witness are dealt with by the Qanun-e-Shahadat and the Evidence Act. A recovery and a Court witness is dealt by the Code of Criminal Procedure.

4.2.1 Privileged Witness

Privileged communication can be disclosed according to articles 4-14 of the Qanun-e-Shahadat and sections 121-132 of the Evidence Act only if the person offers himself as a witness. In Islamic law, as mentioned earlier, business partners and certain natural and fiduciary relatives are not allowed to give testimony for each other as mentioned in chapters 2.1.2 and 3.1. By analogy it could be said that denying the testimony of a certain set of persons may by itself be granting a privilege. For example, the testimony of a husband and wife in favour of each other is not admissible.[167] This appears in article 5 of the Qanun-e-Shahadat and section 122 of the Evidence Act in a qualified form. The privilege conferred upon the couple by the statute is that the Court cannot compel them to give evidence unless consent is acquired from the party regarding whom the disclosure is to be made. This protection is waived if there is a suit between the couple. If it is seen from the Shafei school of thought the testimony in favour of husband and wife is perfectly admissible.[168] This rule by way of Talfiq can well be made applicable to the Hanafi school of thought.

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[167] *Hedaya*, 1791, Vol. II, pp. 685-6

[168] *Minhadj at Talibin*, (with Arabic Text) translated in French by L.W.C. Van Den Berg, Batavia, 1884, Vol. III, p. 404; *Minhaj et Talebin* : a manual of Muhammadan law according to the School of Shafei by Mahiuddin Abu Zakaria Yahya ibn Sharif en Nawawi, translated into English from the French edition of L.W.C. Van Den Berg by E. C. Howard, London, 1914, p. 516

An example of Advocate client relationship will also make the position of the privileged witness clear. A letter between an advocate and a client is covered by the rule of confidential communication as appears in article 12 of the Qanun-e-Shahdat. Neither the advocate nor the client can be compelled to disclose the content of such communication unless such person offers himself as a witness. In such a case he may be compelled to disclose the communication. Article 9 of Qanun-e-Shahadat imposes restriction on an advocate not to disclose any communication made to him by his client. However with the consent of the client he can disclose any advice given to him. In Asaf Hussain's[169] case it was held by the Court that it was not fair on the part of the complainant-client to have sent a letter he received from his advocate to the learned Chief Justice, when the advocate allegedly in contempt of Court had made efforts to write professionally to his client explaining factual position regarding the hearing of an appeal in sheer good faith. In other words the Court most possibly found the contemned advocate a disinterested witness. But there is no privilege attached to doctor-patient relationship.[170] If a psychiatrist or a doctor was called to give expert opinion on a certain point, who then disclosed a extra judicial confession made by the accused to him it is difficult to say what remedy the accused might have.

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[169] Dr. Asaf Hussain Jafri v. K.B. Bhutto PLD 1990 Karachi 173; corresponding sections of the Evidence Act is 126 to article 9 and 129 to article 12 of the Qanun-e-Shahadat.

[170] Manning, 'Psychiatric Evidence' 1975-76 at p. 350

4.2.2 Expert Opinion

So far witnesses of fact have been discussed. A witness of fact is not permitted to express an opinion arising from his knowledge of facts. A witness of opinion has special knowledge acquired during special training and experience.[171] Expert opinion is admissible under section 45 of the Evidence Act and article 59 of the Qanun-e-Shahadat. Sections 509 and 510 of the Code of Criminal Procedure mentions only medical and chemical expert. A medical expert may be summoned and examined as a witness by virtue of section 509 of the Code of Criminal Procedure. It would follow that a chemical examiner or any other class of experts may also be summoned and examined as witness.[172] The test for judging the competency of an expert is to determine whether he is skilled and has adequate knowledge in a particular calling to which the enquiry relates.[173] It is for the Court to decide the question of competency and fitness of such a witness and the test is to see if the witness is sufficiently qualified by experience.[174]

In Islamic law, in a difficult matter that is beyond the comprehension of an average person, expert testimony is required. Opinions of experts and the persons especially versed in some particular branch of science or Mahirin-e-Fan are admissible in evidence.[175] The evidence of experts count as single witness

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[171] Mildred, R. H. *The Expert Witness*, London et al, 1982, p. 2

[172] Talib Hussain and another v. The State 1986 P Cr. L J 1545 at p. 1555 [Lahore] following Shah Muhammad v. The State 1980 P Cr. L J 257

[173] Abdur Rahman Syed v. State 44 DLR 1992 HD 556 at p. 572

[174] Ehsan Elahi Mali v. The State 1980 P Cr. L J 186 at p. 189 [Karachi]

[175] *Minhadj at Talibin*, 1884, Vol. III, p. 450; *Minhaj et Talebin*, 1914, p. 536; Husain, 1977, p. 120

testimony. S/he will need to be corroborated by some other person or circumstances.

The precedent established in Pakistan and Bangladesh is that the opinion of a medical witness, however eminent, need not be read as conclusive of the fact that the Court has to decide, and the statement of an expert stands on precisely the same footing as that of any other witnesses and may or may not be accepted by the Court.[176] The same view was earlier stated by the Court of Bangladesh that an expert's opinion may be considered by the Court in forming its own opinion on the issue before it. An expert giving his opinion must give reasons in support of his opinion[177] and if the Court thinks that the reasons are not cogent or that there is other authentic evidence on the point and that the evidence is in conflict with the opinion of the expert then the Court is quite competent to prefer that evidence to expert's opinion.[178] For example if the evidence of an expert is to be discarded evidence or the relevant passages of a book which are sought to discredit his opinion must be put to him.[179] The weight to be attached to the opinion of an expert duly proved in evidence depends on the cogency of reasons given by the expert for the opinion.[180] Section 60 read with section 45 of the Evidence Act[181]

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[176] Aqeel Ahmed v. The State 1992 P Cr. L J 42 at p. 46 [Karachi]; Sheikh Salimuddin v. Ataur Rahman and others 11 BLD 1991 HCD 386 at p. 394=43 DLR 1991 HD 18 at p. 24; Ghulam Sarwar v. The State PLD 1983 Peshawar 152 at p. 157 referring to Said Ahmad v. Zamurrad Hussain and 4 others 1981 SCMR 795 p. 155 and State v. Aminullah and another PLD 1972 Peshawar 92

[177] Talib Hussain and another v. The State 1986 P Cr. L J 1545 at p. 1555 [Lahore]

[178] Prafullah Kamal Bhattacharya v. Ministry of Home Affairs, Government of Bangladesh 28 DLR 1976 123 at p. 127

[179] Amanullah and 4 others v. The State 1984 P Cr. L J 2798 at p. 2802 [Karachi] following AIR 1954 SC 28 and PLD 1957 SC (India) 426

[180] Riaz-ud-Din Jauhar v. The State 1985 P Cr. L J 1849 at p. 1867 [Lahore] following Behram Sheriar Irari v. Emperor AIR 1944 Bom 321, Mumtaj-ud-

makes it clear that if the opinion of an expert on a point of science in which he is well-versed is relevant, this opinion must be given on record through his own testimony in Court.[182] If the experience in the field claimed by the expert witness is not challenged in cross examination it seems that the evidence of the witness would be admissible.[183]

After the introduction of the Hudud laws it seems Courts put emphasis on the opinion of experts. In one decision the Karachi Court held that the opinion of an expert is a legal necessity for conviction of an accused in cases involving intoxicants,[184] although none of the Hudud laws demand such proof.

Expert evidence, medical or ballistic, is entirely in the nature of confirmatory or explanatory of direct or other circumstantial evidence.[185] The reason is that expert witness could be fallible. Although expert opinion is often direct evidence on the state of the body of the victim,[186] medical testimony leaves some probabilities open. Some further confirming circumstance, however slight in value, is required.[187] This observation should be true of all kinds of expert opinion.

Din v. The State PLD 1958 Dacca 1, Sanity Kumar Roy v. Chairman Jesoor Municipality PLD 1971 Dacca 5, Yaqoob Shah v. The State PLD 1975 Pesh 205 and Ali Haider v. The State 1981 P Cr. L J 97 Lah (D.B.)

[181] The corresponding articles are 71 and 59 of the Qanun-e-Shahadat.

[182] Kutubuddin Ahmed Siddiky v. East Pakistan Industrial Development Corporation 27 DLR 1975 HD 433 at p. 435

[183] Ehsan Elahi Malik v. The State 1980 P Cr. L J 186 at p. 189 [Karachi]

[184] Shahzado v. The State 1992 P Cr. L J 1985 at p. 1988 [Karachi]

[185] Ghulam Sarwar v. The State PLD 1983 Peshawar 152 at p. 158 referring to Yaqoob Shah v. State PLD 1976 SC 53; Klawans, Harold L. *Trials of an Expert Witness*, London, 1991 pp. 10-11

[186] Malik, Dr. B., *Field's Expert Evidence*, 2nd ed., Delhi, 1984, p. 191

[187] Ahmad and 2 others v. The State 1980 P Cr. L J 865 at p. 871 [Lahore]

It seems that the Court considers an expert witness as an independent witness within the meaning of the definition offered in this chapter.[188] For example, if a doctor called as an expert witness were also found to be a relative of the accused or the deceased the Court would be more cautious in hearing his expert opinion. To guard an expert witness against being giving biased opinion, or from making innocent mistakes, the rule of corroboration is emphasised by saying that in the presence of direct evidence the expert opinion may be ignored.

Some examples from case law would show in what circumstances the Court places reliance on expert evidence. It will be marked from the case law that the Court places reliance on the ocular testimony or circumstances of each case to come to a conclusion. Only when the statement of a witness or the facts of a case corroborate with that of the expert opinion does the Court rely on expert evidence.

Muhammad Razaq v. State[189] is related to Zina bil jabr of a girl of ten years. The Court believed the victim and three other eye witnesses. The male doctor who examined the accused could not identify him in his cross examination. In his report he did not even take the signature or thumb impression of the accused. The lady doctor avoided saying in clear words that rape had been committed upon the victim, though the victim was bleeding at that time. Instead she chose to depose that the victim who was admittedly ten years old was not a virgin. The Court observed that, from the tenor of the statement of the lady doctor, it appeared that she had not been quite

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[188] see chapter 4.1.2

[189] Muhammad Razaq v. State PLD 1985 FSC 298 at pp. 301-3

honest in giving a frank and straightforward opinion about rape having been committed upon the child.

In Tajammal Husssain v. The State,[190] the Shariat Appellate Bench held that the results of the examination conducted by the doctor, for evidence of sodomy contradicted his own opinion that it was only a case of attempt.

In Muhammad Siddiq v. The State,[191] the medical evidence revealed that the victim had suffered the occurrence as the first act of sexual intercourse. The defence contended that the woman was married and the lady doctor had not told the truth. The Shariat Appellate Bench held that this did not hold good because the circumstance also proved that the doctor had given a truthful opinion.

The case of Muqarrab Jahan Begum v. Sikandar Ali Khan[192] is a unique example of misuse of section 6 of the Muslim Family Laws Ordinance, 1961 and delay in the proceedings of the Court and perhaps male chauvinistic attitude. Since family law is not the issue of this thesis it is left without discussion. The husband in this case applied for a second marriage under section 6 of Muslim Family Laws Ordinance 1961 to a Chairman of the Arbitration Council. The Chairman did not have territorial jurisdiction. The Chairman gave permission of marriage on the alleged consent given by the wife on 29-1-1971 by signing the document. The wife denied having given her consent, and on that basis the signature was referred to a handwriting expert who gave an opinion that the signature on the document did not tally with the specimen signature. Thereupon the

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[190] Tajammal Hussain v. The State PLD 1989 SC 747 at p. 748 also see chapter 3.1.3.1

[191] Muhammad Siddiq v. The State PLD 1990 SC 1079 at p. 1081

[192] Muqarrab Jahan Begum v. Sikandar Ali Khan and 2 others PLD 1987 Lahore 316 at p. 318-9

case was remanded for fresh adjudication. She continued with her claim of not having given consent until the collector refused her revision on the third occasion. She came to the Court at last in 1984. It took three years for the Court to decide in 1987 that the evidence of the hand writing expert was unrebutted and unchallenged and the Chairman had no jurisdiction in the matter as conceived by law on 29-1-1971. The Order was set aside as being *coram non judice* (in the presence of one who is not a judge). The Court did not mention about the untold suffering that the woman had been through for at least 16 years on record, nor about the misuse and fraudulent behaviour from some of those who were involved with the case, neither did the Court extend any compensation to the woman. The Court may not base conviction solely on the opinion of the handwriting expert without independent corroboration[193] In this case, from the legal point of view, in the presence of other evidence on record, the handwriting of the expert was corroborated. Since the above case was of civil nature and the decision having minimal effect on the adverse party, the probative value of the handwriting expert was therefore perhaps not discussed.

In Mst. Zarina Bibi v. The State,[194] according to the prosecution a baby was born from illicit relations and was killed soon after its birth. The medical witness stated that the baby was born alive. The Court decided that the medical opinion could not bear the stamp of proof in the absence of ocular evidence.

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[193]Muhammad Idrees v. The State 1993 P Cr. L J 410 at p. 415 [Karachi]; Eklas Khan and others v. Prajesh Chandra Das and others BLD 1987 AD 142 at p. 146

[194]Mst. Zarina Bibi v. The State PLD 1983 Peshawar 218 at p. 219

4.2.3 Recovery Witness

A recovery witness is a person who accompanies the investigating personnel to testify to the search of a place or person and anything recovered therefrom.

There are no rules regarding recovery witness in the Qanun-e-Shahadat or the Evidence Act. Section 103 of the Code of Criminal Procedure of 1898 only provides that for a search of a place two independent witnesses from the locality are required. This fact by itself is according to strict rules of Islamic law. For the proof of any fact apart from the Hudud offences, Islamic law insists on at least two witnesses. It is also of importance to note that when this provision was incorporated in the Code of Criminal Procedure in 1898 the Evidence Act of 1872 was already in force. According to section 134 of the Evidence Act, no particular numbers of witnesses are necessary for the proof of any fact. Both statutes, i.e. the Evidence Act and the Code of Criminal Procedure, are part of the general law. It may hence be construed that, at least regarding this provision, the Code of Criminal Procedure was influenced by the Islamic law. Section 103 of the Code of Criminal Procedure was enacted to ensure fair dealing on the part of the officer making search.[195] It is designed as a safeguard against possible plantation of property and consequent false implication of an accused person. It is mandatory for the police officials to call upon two or more respectable inhabitants of the locality to attend and witness the search.[196] The section used the word 'shall call.' If the provision is breached grave doubt will be

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[195] Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 86 [Karachi]

[196] The State v. Noor Ahmad alias Thola and 3 others 1991 P Cr. L J 2007 at p. 2019 [Shariat Court (AJ&K)] ; Muhammad Nadeem v. The State 1988 P Cr. L J 869 at p. 872 [FSC]

cast on the whole transaction.[197] A strict requirement of section 103 Code of Criminal Procedure is not always insisted.[198] It is to be noted that residents of village do not readily come forward to become recovery witnesses. It would mean that if independent witnesses are not cited as witnesses it would not necessarily follow that the recoveries are false.[199] It is also to be noted that where recovery is to be made in a restricted area the requirement of section 103 of the Code of Criminal Procedure can be reinterpreted to mean that the rule in such circumstances is a rule of prudence rather than a rule of law.[200] In the absence of any compelling or substantial reason the provisions of section 103 must be complied with while conducting a search.[201]

Section 103 of the Code of Criminal Procedure applies to house searches or enclosed places, it does not apply to personal searches when taken at a public place.[202] The occupant of the house should also be there at the time of search. Section 103 is aimed to safeguard the interest of persons whose houses are to be searched.[203] The Court should jealously guard this valuable right.[204]

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[197] Abdul Hameed v. The State 1987 P Cr. L J 1707 at p. 1710 following Muhammad Khan v. Dost Muhammad and other PLD 1975 SC 607

[198] Muhammad Sharif v. The State 1982 P Cr. L J 615 at p. 618 [Lahore]

[199] Amira and 3 others v. The State 1987 P Cr. L J 473 at p. 478 [Lahore]

[200] Muhammad Maskin v. The State 1990 P Cr. L J 590 at p. 595 [FSC]

[201] Daud Ali v. State 27 DLR 1975 HD 155 at p. 158

[202] Shafique Ahmed v. The State 1991 P Cr. L J 1424 at p. 1427 [Karachi] following Rehmat v. The State PLD 1976 Lah 144; Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 86 [Karachi]; Sikandar v. The State 1992 P Cr. L J 97 at p. 100 [Karachi]; Amanullah v. The State 1992 P Cr. L J 430 at p. 433 [Peshawar]; Muhammad Saleem v. The State 1992 P Cr. L J 35 at p. 37 [Karachi]

[203] Pachu v. State 26 DLR 1974 HD 297 at p. 302

[204] Muhammad Saleem v. The State 1992 P Cr. L J 35 at p. 37 [Karachi]

The case law has detailed rules regarding recovery witness. For example, the recovery witness should belong to the locality, be respectable and disinterested.[205] The emphasis concerning recovery witnesses is on respectability, independence and impartiality.

The term 'respectable' has slightly lost its importance after the independence of Pakistan in 1947. In a free society all citizens are deemed respectable unless proved otherwise. This term, which was introduced in the British period, should not be construed narrowly in the light of the present socio-economic status of the inhabitants, but is to be construed in a broader sense by applying the rule of respectability to all citizens in equal manner.[206] Regarding respectability the Pakistani Court reminds the moral teaching that it cannot be attributed only to wealth, social or economic status. Even the poorest and humble person can be more respectable than any wealthy person. It is the reputation and respectability of a person he commands which should be the criterion.[207] There is no question that the police officers are respectable persons but for the interest of public confidence in the administration of justice independent respectable persons of the locality is a requirement. This is in accordance with the golden rule of Islamic law.[208]

The term 'locality' is not defined in the Code of Criminal Procedure or other relevant laws. It cannot mean a particular distance.[209] It

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[205] Saiful Latif etc. v. The State 1981 P Cr. L J 1238 at pp. 1239-40 [Rawalpindi Bench]

[206] The State v. Noor Ahmad alias Thola and 3 others 1991 P Cr. L J 2007 at p. 2019 [Shariat Court (AJ&K)]

[207] Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 86 [Karachi]

[208] Muhammad Nadeem v. The State 1988 P Cr. L J 869 at p. 872 [FSC] following Muhammad Shafi PLD 1987 FSC 16 and Muhammad Khan v. Dost Muhammad and others PLD 1975 SC 607

[209] Taj Muhammad and 6 others v. The State 1980 P Cr. L J 927 at p. 935 [Lahore]

has to be construed in the broader sense to avoid any likelihood of difficulty at the stage of investigation or trial. Reference to the term 'locality' should not be construed in a narrow sense by reducing the distance between the place of recovery and the residence of the witness of recovery. The object of law is to be kept in view to ensure that the police officer who made the recovery was accompanied by two other persons, and that is a sufficient test to uphold the recovery of incriminating articles.[210]

If, a person is, at a particular place, in the normal and natural course, and is not a chance witness, he can act as a recovery witness. An interested or inimical person could not be a recovery witness.[211] Also a relative could not be a recovery witness unless he is equally related to both the parties.[212] A relative from the same locality could be accepted as a recovery witness if the recovery is found to be true,[213] corroborated by an independent witness[214] and not found to be interested.[215] Such relatives could be termed as independent witnesses.[216] A disinterested witness is preferred to an interested

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[210] The State v. Noor Ahmad alias Thola and 3 others 1991 P Cr. L J 2007 at p. 2019 [Shariat Court (AJ&K)] following Qilandar Shah PLD 1957 AJ&K 1, Taj Muhammad 1980 P Cr. L J 927, Muhammad Sharif 1982 P Cr. L J 615.

[211] Muhammad Haneef and another v. The State 1979 P Cr. L J 1078 at p. 1098 [Lahore]; Mumtaz Khan v. The State 1984 P Cr. L J 407 at p. 411 [Lahore]

[212] Ishaque v. State PLD 1985 Karachi 595 at pp. 605-6

[213] Sheri Zaman and 3 others v. The State 1989 P Cr. L J 1526 at p. 1533 [Peshawar]; Akbar and another v. The State 1984 P Cr. L J 3108 at p. 3115 [Karachi]

[214] Ali Gohar and 2 others v. The State 1984 P Cr. L J 1111 at p. 1122 [Karachi] If independent witness does not support the relative as in Abdul Haleem v. The State 1984 P Cr. L J 2791 at p. 2794 [Karachi] recovery can not be believed.

[215] Nazim v. The State 1985 P Cr. L J 1951 at pp. 1956-7 [Lahore]; Leemon and another v. The State 1984 P Cr. L J 2690 at p. 2698 [Karachi]; The State v. Noor Ahmad alias Thola and 3 others 1991 P Cr. L J 2007 at p. 2020 [Shariat Court (AJ&K)]

[216] Sajjad Hussain v. The State P Cr. L J 1414 at p. 1419 [Lahore]

witness to prove recovery.[217] In the presence of disinterested witnesses from the locality, recoveries witnessed by relatives may have less value.[218] If no recovery witness is associated from the locality and close relatives or persons associated with the rival parties are brought from a distant place, it creates doubt in the mind of a prudent person.[219] If the recovery is to be made on public thoroughfare, a bus stand or similar public places, the witnesses picked up by the police from the road, can be proper recovery witnesses depending on the facts and circumstances of the case.[220] The following case law will show in what circumstances their evidence is admitted.

In Behram Khan v. The State,[221] three eye witnesses to the recovery of heroin were a waiter and two police officers. It was recovered from the person of the accused sitting in a compartment of a train. The Court decided that the waiter was a natural witness who was present at the railway station in the normal course of his duty. He was an independent witness of the locality who had no motive to implicate the appellant in a false case. In cross examination he affirmed that he had not appeared as a witness in any other case, which proved that he was not among the stock witnesses[222] of the police. Regarding the two other witnesses, the fact of their being

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[217] Muhammad Nadeem v. The State 1988 P Cr. L J 869 at p. 872 [FSC]

[218] Muhammad Naseem v. The State 1981 P Cr. L J 1292 at p. 1297 [Lahore]

[219] Akhtar Hussain v. The State 1985 P Cr. L J 2387 at p. 2387 [Lahore]; Ghulam Rasool v. The State 1985 P Cr. L J 1097 at p. 1102 [Lahore]; Hidayatullah and 3 others v. The State 1983 P Cr. l J 447 at p. 454 [Karachi]; Muhammad Yaqoob and 3 others v. The State 1982 P Cr. L J 961 at p. 976 [Karachi]; Pachu v. State 26 DLR 1974 HD 297 at p. 302 following AIR 1930 Bom 169, AIR 1933 Lah 809 and AIR 1947 All 165

[220] Taj Muhammad alias Tajoo v. The State 1991 P Cr. L J 2167 at p. 2170 [Karachi]

[221] Behram Khan v. The State PLD 1984 SC 278

[222] see for definition chapter 3.1.2

police officers was not sufficient to discard their evidence. They had no enmity or motive against the appellant to involve him in a false case.

It is considered by a decision that it is an open secret that the police have always certain people at hand who are prepared to go to any extent with them.[223] If the police cannot find a search witness from the locality it is the duty of the Court to find out the reason.[224] The testimony of police officials alone on the point of search would create suspicion.[225] But in some grievous cases the local people do not want to get involved for fear of incurring the ill will and wrath of the saboteurs to witness the recovery.[226] It has also been noticed that normally the persons cited as recovery witnesses from the public are forced to renege on their version at the trial. In those cases if the police is proved not to be interested or inimical their testimony carries probative value.[227] If the recovery witness is a police officer who is interested, it needs corroboration from independent evidence of unimpeachable character.[228] Recovery by investigating officer done inattentively would lose its evidentiary

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223 Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 86 [Karachi] following Sardar Ali v. The State PLD 1964 Lah 386, Jahana v. The State 1978 P Cr. L J 157 and State v. Abba Ali Shah alias Abba Umar and another PLD 1988 Kar. 409

224 Muhammad Ameen v. The State 1990 P Cr. L J 84 at p. 86 [Karachi]

225 Muhammad Saleem v. The State 1992 P Cr. L J 35 at p. 37 [Karachi] following Muhammad Ismail v. The State PLD 1979 Kar. 31 and Yameen Kumhar v. The State PLD 1990 Kar. 275

226 Khizar Hayat and 2 others v. The State 1984 P Cr. L J 54 at p. 75 [Lahore]

227 Taslim Khan v. State PLD 1990 SC (Sh. App. B.) 1088 at p. 1090; Zaidullah v. State PLD 1990 SC 1186 at p. 1191; Abdul Baqi v. The State 1990 P Cr. L J 145 at p. 151 [Peshawar]; Muhammad Hassan and another v. The State 1982 P Cr. L J 888 at p. 894 [Karachi]

228 Ramzan and another v. The State 1991 P Cr. L J 1916 at p. 1918 [Lahore]; Muhammad Aslam v. The State 1991 P Cr. L J 2064 at p. 2065 [Lahore]; Abdul Sattar v. The State 1985 P Cr. L J 1594 at p. 1595 [Lahore]

value.[229] Recovery witnesses both by police and public should be corroborative of each other.[230] In case of contradiction between the police and the public witnesses, recovery cannot be considered as evidence.[231]

In raid cases, administered by the magistrate, the recovery witnesses are generally taken from the place where a raiding party is formed. The witnesses may not be from the locality.[232] But when the police go with the purpose of arresting an appellant with advance spy information they must take two respectable inhabitants. Non-compliance with the law would vitiate the recoveries. If the police goes for a general patrol where the appellant might have been incidentally arrested in suspicious circumstances and recoveries were made from him, the compliance of section 103 would not be a must.[233]

After the introduction of Hudud laws it seems that the Courts have become strict in interpreting section 103 of the Code of Criminal Procedure. Although it is acknowledged in many cases that the public do not want to associate themselves with narcotic cases, the Federal Shariat Court decided a case on technical ground : that since no witness from the locality is made to recovery in a raid case, it is not proved beyond doubt.[234] It seems that the judges try to avoid

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[229] Sher Dil and another v. The State 1984 P Cr. L J 2997 at p. 3000 [Lahore]

[230] Yaqoob v. The State 1980 P Cr. L J 704 at p. 707 [Lahore]; If one of the recovery witness turns hostile and the testimony of other witness contradicts, their testimony is rejected, Muhammad Ashiq and another v. The State 1981 P Cr. L J 1343 at p. 1347 [Lahore]

[231] Abdul Wahid alias Abdul v. The State 1993 P Cr. L J 1739 at p. 1745 [Karachi]; Muhammad Ashraf v. The State 1991 P Cr. L J 2274 at p. 2275 [Lahore]; Javed Iqbal v. The State 1990 P Cr. L J 1827 at p. 1830 [FSC]

[232] Kandhla (Kandla) v. The State 1983 P Cr. L J 1869 at p. 1872 [Lahore]

[233] Ali Gul v. The State 1980 P Cr. L J 407 at p. 408 [Karachi]

[234] Muhammad Boota v. The State 1985 P Cr. L J at p. 1381 [FSC] see chapters 3.2 and 4.1.1.2

confontration with the Hudud laws. Instead of reinterpreting the law they avoid the whole issue.

Recovery witnesses must be respectable and from the locality.[235] In State v. Abba Ali Shah,[236] all the three witnesses were from outside the locality. The Court observed that no effort seemed to have been made to procure witnesses from the locality. The three witnesses were interested or doubtful. The complainant had asked these three witnesses to accompany the police. The Court, therefore, did not rely on these recovery witnesses. If independent respectable persons are excluded deliberately a presumption should be raised that the recoveries were not genuine.[237] Generally a recovery witness outside the locality, in the presence of local witnesses, is not believed.[238] They are considered as chance witnesses.[239] A recovery witness not from the locality is a non-compliance of the mandatory provision of section 103 of the Code of Criminal Procedure.[240] Recovery witnesses who are independent and respectable should not be disbelieved simply because they are not residents of the nearby

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[235] Muhammad Achar v. The State PLD 1990 Karachi 314 at p. 322

[236] State v. Abba Ali Shah PLD 1988 Karachi 409

[237] Raj Ali and others v. The State 1987 P Cr. L J 1817 at p. 1821 [Lahore]; Muhammad Sharif v. The State 1986 P Cr. L J 637 at pp. 644-5 [Karachi]; Sher Muhammad v. The State 1985 P Cr. L J 1937 at p. 1937 [Lahore]; Muhammad Yasin v. The State 1985 P Cr. L J 1931 at p. 1931 [Lahore]; Mumtaz Khan v. The State 1984 P Cr. L J 407 at p. 411 [Lahore]; The State v. Jameel Ahmad and another 1984 P Cr. L J 1011 at p. 1014 [Karachi]; Umar Hayat and 2 others v. The State 1983 P Cr. L J 2247 at p.2256 [Lahore]; Ahmad Khan and another v. The State 1982 P Cr. L J 74 at p. 80 [Lahore]; Muhammad Hanif v. The State 1980 P Cr. L J 345 at p. 347 [Lahore]

[238] Zaheer-ud-Din v. The State 1989 P Cr. L J 92 at p. 95 [Lahore]; Abid alias Bhola v. The State 1984 P Cr. L J 2553 at p. 2555 [Lahore]; Muhammad Rafique v. The State 1984 P Cr. L J 1906 at p. 1909 [Lahore]; Ghulam Nabi Shah and others v. The State 1981 P Cr. L J 830 at p. 834 [Lahore]

[239] Shah Gulam and another v. The State 1984 P Cr. L J 2644 at p. 2647 [Lahore]; Abdullah v. The State 1985 P Cr. L J 1938 at p. 1945 [Karachi]

[240] Haji Moosa v. The State 1987 P Cr. L J 305 at p. 307 [Karachi]; The State v. Jameel Ahmad 1984 P Cr. L J 1011 at p. 1014 [Karachi]

locality,[241] in particular if it is shown that he was not falsely planted as a recovery witness.[242]

Requirement of section 103 of the Code of Criminal Procedure applicable to recovery, search and arrest, made during investigation of crime are mandatory but not absolute. It could be re interpreted as directory in nature.[243] In exceptional circumstances, as stated above, departure could be made from this section.[244] In certain circumstances, in the presence of valid and reasonable explanation, non-compliance of it will not make a search and recovery illegal.[245] Police officers can be believed as recovery witnesses,[246] when it is difficult, if not impossible for police to procure private persons to witness the search, and there is the risk of the accused fleeing away.[247] On this principle, with reasonable explanation, non involvement of local people was acceptable in Khanzada Mir v. State.[248] In this case both the recovery witnesses were police officials, but their statements were not discarded as their versions was consistent and qualified with the circumstances without any material discrepancies. The Court observed that the speed with which they had to rush to catch the hijackers and to recover the car

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241 Shaukat Hayat and another v. The State 1990 P Cr. L J 217 at p. 264 [Karachi]; The State v. Azhar Hussain and another 1987 P Cr. L J 2532 at p. 2544 [Multan]

242 Tufail Maseeh v. The State 1980 P Cr. L J 2623 at p. 2629 [Lahore]

243 Arshad Zubair v. The State 1992 P Cr. L J 1717 at p. 1720 [Lahore]

244 Abdul Wahid alias Babu v. The State 1993 P Cr. L J 1431 at p. 1433 [Karachi]

245 Yameen Kumhar v. The State PLD 1990 Karachi 275 at p. 283; Ghulam Ghaus v. The State 1983 P Cr. L J 1264 at p. 1267 [Karachi] following Muhammad Khan v. Dost Muhammad PLD 1975 SC 607

246 State v. Abdul Fattah and another 1982 P Cr. L J 781 at p. 788 [Karachi]

247 Abdul Raheem v. The State 1991 P Cr. L J 2225 at p. 2228 [Karachi] following Sohail Amjad v. The State 1986 SCMR 1482

248 Khanzada Mir v. State PLD 1979 Peshawar 215

did not leave them with any time to procure non official witnesses from the locality.

4.2.4 Court Witness

The term Court witness is associated with section 540 of the Code of Criminal Procedure, section 165 of the Evidence Act and article 161 of the Qanun-e-Shahadat. The scope of section 540 is very wide. According to the first part of the section, a Court may at any stage of any inquiry, trial, etc. summon any person as a witness, or examine any person in attendance, although not summoned as a witness, or recall and examine any person already examined. The second part of the section is imperative. It enables the Court to summon and examine or recall and re examine any person whose evidence appears to be essential to the just decision of the case.[249] It is pertinent to note that while in the former situation, it is a matter of discretion with the trial Court to take action, in the latter one, it is obligatory on the Court to summon such witness, subject to the sole condition that it should appear to the Court essential for the just decision of the case.[250]

Section 165 of the Evidence Act and article 161 of the Qanun-e-Shahadat empowers a judge to put questions to parties and witnesses and order the production of any documents for discovering proof.

A witness, notwithstanding that he is called and examined or recalled or re examined under section 540, retains his character as a

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[249] Mahboob v. The State 1989 P Cr. L J 2050 at p. 2054 [Peshawar]; Joynal Gazi v. The State 35 DLR 1983 HD 422 at p. 424 following Maung Po Hunyin v. Emperor 25 Cr. L. J 217 and Mohammad Akbar v. Emperor 49 Cr. L. J. 242

[250] Sajjad alias Shahzad and others v. The State 1989 P Cr. L J 1872 at p. 1873 [Karachi]; Muhammad Siddique v. Fateh Muhammad 1989 P Cr. L J 1879 at p. 1880 [Lahore]; Mahboob v. The State 1989 P Cr. L J 2050 at p. 2054 [Peshawar]

prosecution or defence witness, as the case may be. He could be Court witness *simpliciter* if he was neither cited as a prosecution witness nor a defence witness.[251] A prosecution witness given up by it can also be summoned as Court witness.[252] The Court may summon[253] or recall or resummon[254] any witness or document[255] to arrive at a just decision. The power of discretion to summon a witness has to be exercised judicially and on sound basis to find out something which is not on record due to the failure of the party, or due to the reasons beyond the control of the parties, or on account of something which has come to light during trial.[256]

The Court cannot act as a prosecutor nor can it fill in the lacunae left by the prosecution by using power under section 540.[257] For example negligence on the part of the prosecution can never be a ground for taking additional evidence.[258] The Court may not examine a person as a Court witness on his or her request if it believes that such examination is not essential for the just decision of the case.[259] The provision cannot be pressed into service where

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[251] Jewan and 9 others v. The State 1980 P Cr. L J 570 at pp. 573-4 [Lahore]

[252] Muhammad Israr and 5 others v. The State 1987 P Cr. L J 244 [Lahore] following Venigopal Mudalior v. The State AIR 1952 Mad 39

[253] Mehrzad Khan v. The State PLD 1991 SC 430 at p. 443

[254] Muhammad Waqar v. The State 1991 P Cr. L J 197 at p. 199 [FSC]; Riaz-ud-Din Jauhar v. The State 1985 P Cr. L J 1849 at p. 1856 [Lahore]

[255] Abdul Sattar v. The State 1986 P Cr. L J 1536 at p. 1538 [Special Court (Offences in Banks)]

[256] Saleem Ahmad Naseer v. The State and another 1985 P Cr. L J 1078 at p. 1080 [Lahore]

[257] Muhammad Israr and 5 others v. The State 1987 P Cr. L J 244 at pp. 245-6 [Lahore]; Abdul Sattar v. The State 1986 P Cr. L J 1536 at p. 1538 [Special Court (Offences in Banks)

[258] Habibullah and others v. The State 12 BLD 1992 HCD 454 at pp. 457-8

[259] Mst Ubaida v. Makhdoom Abrar Ahmad and 2 others 1986 P Cr. L J 539 at p. 541 [Lahore]; Gillat Shah v. The State 1982 P Cr. L J 933 at p. 934 [Lahore]

the defence can produce witnesses.[260] The provision of Court witness reflects the inquisitorial nature of the present judicial system of Pakistan and Bangladesh.

4.3 Conclusion

The Courts often use the same term interchangeably as in the case of interested and partisan witnesses, and independent and disinterested witnesses. Since the Courts constantly use these terms to signify a certain kind of witness it is useful to have a clear definition of each category. In this chapter an attempt is made to give such clear definition based on the decision of the majority of the relevant case law.

Apart from presenting with a definition an attempt is made to give a comprehensive idea of the different kinds of witness testimony and admissibility of their evidence by the Courts. It would appear that the Courts are cautious in accepting witness testimony without corroboration. In some cases the corroboration has become an established precedent as in cases of interested witnesses. The reservation with which the interested witnesses in Pakistan and Bangladesh are accepted reflects the legal and social awareness of the pre-Evidence Act period when relatives and other interested witnesses were barred from giving evidence discussed in chapter two, and the judges' intellectual reasoning of mind. Various categories of witnesses include both the concepts of witnesses prevailing before the Evidence Act was passed.

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[260] Muhammad Israr and 5 others v. The State 1987 P Cr. L J 244 at pp. 245-6 [Lahore]

The fact that eye witnesses can make mistakes as to their perception is not discussed with sagacity in the case law. It is possible that no matter how independent and/or natural a witness be, his/her imagination and background may keep them from rendering a fact objectively. It is found in individual research in the west that witnesses do not always knowingly lie out of bias. The individual capacity to retain in memory or the basic human nature to perceive a thing subjectively or in a certain manner may make the perception of a fact different from what really happened.

CHAPTER 5

5. Proof by Witness Testimony and Confession

In this chapter, evidence by witnesses involving the number of witnesses, confessions, and dying declarations are discussed. As Qanun-e-Shahadat and the Hudud laws in Pakistan have brought changes in these three areas of testimony, this chapter seeks to examine these three areas to find out if they have brought substantial changes in the development of law of evidence in Pakistan *vis a vis* Islamic law, and as opposed to the law of evidence in Bangladesh. Article 17 of the Qanun-e-Shahadat and Hudud laws in Pakistan require more than one witness in certain cases. The Hudud laws expressly recognise confession as a mode of proof for Hudud offences and article 44 of the Qanun-e-Shahadat virtually gives the accused the status of a witness. It is to be noted that article 44 is a new article which does not appear in any form in the Evidence Act, whereas an amendment in 1985 to section 340 of the Code of Criminal Procedure 1898 in Pakistan made it obligatory for the accused to offer himself as a witness. Therefore an accused-witness may give testimony and also confess. The evidentiary value of confession may vary as the accused-witness gives testimony. A dying declaration can be proven by the testimony of the people present at the time of the making of the statement by the dying person. Article 71 recognises Shahada ala Shahada, testimony on testimony, as a form of proof which is added into the Qanun-e-Shahadat as the third proviso. For this chapter Shahada ala Shahada is only restricted to a dying declaration. A dying declaration in particular is of importance because of the introduction of the Qisas and Diyat law by the

Criminal Law (Third Amendment) Ordinance, 1992, in the Pakistan Penal Code of 1860.

In Islamic Jurisprudence evidence essentially consists of testimony and confession,[1] both of which are direct oral evidence. In Pakistan and Bangladesh oral testimony has to be direct evidence. As far as confession is concerned it could be both direct or hearsay evidence. Dying declarations in Islamic law is a form of testimony on testimony and therefore they could be categorised as hearsay evidence or Sima'i-e-Shahadat in Islamic law.[2] Similarly it is admissible as hearsay evidence in the laws of Pakistan and Bangladesh.

To prove a fact the law of evidence requires that the best available evidence is and should always be preferred.[3] Best evidence could be different in different cases. In certain cases which can be perceived by the senses, direct oral evidence is the best evidence. In property matters, primary documentary evidence may be the best evidence.[4] The best evidence rule is a rule of evidence mandating production of the original of a writing, recording, or photograph etc.[5] The best evidence rule is not complete in most of the cases where it does not corroborate with other evidence, e.g. secondary oral or documentary evidence, circumstantial evidence, hearsay evidence, etc. When the

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[1] Muhammad Amin v. The State PLD 1990 SC 484 (Sh. App. B.) at p. 491

[2] Section 20 of The Evidence Enactment of the Syariah Court 1991 in the State of Kelantan, Malaysia, Enactment No. 2 of 1991 defines dying declaration in terms of Qarinah or circumstantial evidence.

[3] Sk. Abdul Majid v. The State BLD 1987 HCD 413 at p. 415; Sher Ali v. The State 1985 P Cr. L J 2790 at p. 2793 [Lahore] if the best evidence is not produced an adverse inference is drawn against the party withholding such evidence.

[4] Afzal Meah v. Bazal Ahmed 45 DLR 1993 HD 15 at p. 18; Graham, Michael H., "Stickperson Hearsay" A simplified approach to understanding the rule against hearsay' in *Evidence and Proof* edited by William Twining and Alex Stein, Aldershot et al, 1992, pp. 451-487 at p. 462

[5] Graham Michael H., 'The Original Writing (Best Evidence) Rule' in *Criminal Law Bulletin* 1990, Vol. 26, No. 5, pp. 432-451 at p. 432

best evidence is not forthcoming it may be substituted by other evidence.

It will be seen throughout the discussion that witness testimony, confession and dying declaration attain the status of best evidence to convict a person in a case where the Court believes that the statement is established beyond reasonable doubt by corroborating with other evidence.

5. 1 Testimony of Witnesses

Witness testimony is direct oral evidence.[6] The Qadi in Islamic law, following the inquisitorial system after summoning the parties and, if necessary, the witnesses, examines the parties and the witnesses himself. Each party may cross examine the other party and his witnesses. In Islamic law the refusal of the parties or the witnesses to answer leads to an adverse decision. The parties and the witnesses are liable to be punished for giving false evidence.[7] Once the witness is summoned to testify, his testimony is scrutinised in the process of examination in chief and cross examination in Pakistan and Bangladesh by the adverse parties,[8] as both of these countries broadly follow the adversary system. In Pakistan and Bangladesh a witness who appears in the witness box cannot refuse to answer a question even if it incriminates him.[9] He is liable to be prosecuted for giving false evidence.[10] There are some exceptions to these rules. No unreasonable questions, indecent or scandalous questions, or questions intended to insult or annoy are allowed by the judge to

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6Article 71 of the Qanun-e-Shahadat, 1984 and section 60 of the Evidence Act, 1872; Phani Bhusan Halder v. The State 27 DLR 1975 HD 254 at p. 255

7see chapters 1.3, 1.3.1, 2.1.2 and 3.1.1 for details

8Chapter X of the Qanun-e-Shahadat and Chapter X of the Evidence Act

9Article 15 of the Qanun-e-Shahadat and section 132 of the Evidence Act

10Chapter XI of the Penal Code, 1860

the witness unless it relates to the fact in issue.[11] In a case of rape the character of the victim can be impeached.[12] In the adversary system, where the parties have primary control over what evidence is presented in what form and questions are or are not put to witnesses, the freedom of enquiry by the judge is extremely limited.[13] But the rule of examination of a witness leaves the judge a good deal of discretion in controlling the manner in which testimony is presented.[14]

Section 134 of the Evidence Act applicable in Bangladesh is only concerned with the qualitative aspect of the testimony though in practice the Court puts emphasis on corroboration, as will appear from the discussion below. Article 17 of the Qanun-e-Shahadat, as applicable in Pakistan has taken a middle course between the Islamic law and section 134 of the Evidence Act by restricting the female gender in financial matters. In the Hudud laws of Pakistan it will be seen that a desperate attempt is made to strike a balance between Islamic law, as laid down by the jurists, and the position as evolved through the case law before the enactment of the Hudud laws.[15] This is done by allowing admissibility of all other evidence for punishment in the form of Tazir. It will be seen from discussion that in practice Pakistan is far from its theoretical lay out of the law.

11Articles 144-8 of the Qanun-e-Shahadat and sections 149-152 of the Evidence Act; Sikandar Hayat v. The State 1993 P Cr. L J 1867 at pp. 1871-2 [FSC] it is the duty of the trial Court to protect the witnesses from being scandalised; Muhammad Amir Khan v. The State 1992 P Cr. L J 1944 at p. 1949 [FSC] Such questions if not proved may lead to prosecution under the provisions of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979.

12Article 151(4) of the Qanun-e-Shahadat and 155(4) of the Evidence Act

13Twining, 1990, p. 194

14Friendenthal, Jack H and Michael Singer., *The Law of Evidence*, New York, 1985, p. 192

15Sections 86 to 88 of the Enactment No. 2 of 1991 in the Kelantan State of Malaysia has much more explicit rules in many respect than article 17 of the Qanun-e-Shahadat and Hudud laws in Pakistan.

Both Pakistan and Bangladesh in practice merge the idea of quantitative and qualitative proof.

5.1.1 Number of witness

In Islamic law jurists generally agree that for Hudud and Qisas two male witnesses must provide consistent testimony, except in cases of Zina wherein four witnesses are necessary.[16] Ibn Hazm(384H/ 994AD-456H/1064AD)[17] argues that the judgment should be allowed on the basis of one witness and the oath of the plaintiff in Qisas. All matters including fiscal matters can be proved by two male witnesses, or in the absence of two male witnesses, by one male and two females. Most of the jurists maintain that judgment can be based on the testimony of one witness and an oath in property disputes and related matters.[18] The Federal Shariat Court in Haider Hussain v. Governmewnt of Pakistan[19] ruled that all fiscal matters shall be proved by two male witnesses, and in the absence of two such male witnesses, by the evidence of one male and two female witnesses. Evidence of single female witnesses shall be admissible in cases relating to birth, virginity and such other matters concerning women as are not usually seen by men. The condition of a female witness does not mean the exclusion of a male witness. It is to be noted that the judgement shows strictness in its interpretation of the Islamic law. It may be noted that the production of any number of witnesses above the lawful number makes no difference with

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[16]Haider Hussain v. Government of Pakistan PLD 1991 FSC 139 at pp. 158-9
[17]*The Encyclopaedia of Islam*, New ed., 1971, Vol. III, p. 790
[18]Salama, 'General Principles....' 1982 at p. 116
[19]Haider Hussain v. Government of Pakistan PLD 1991 FSC 139 at p. 159

respect to the decree.[20] But the rule for Tawatur, discussed below, in general matters is not covered by this rule.

Article 17 of the Qanun-e-Shahadat lays down that the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and the Sunna. In matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly. In all other matters, the Court may accept or act on the testimony of one man or one woman or other such evidence as the circumstances of the case may warrant. But if by any special law the required number of witnesses is otherwise mentioned then that special law is to be followed. According to section 134 of the Evidence Act no particular number of witnesses is required for the proof of any fact.[21]

5.1.1.1 Ahad: Solitary Witness

In Islamic law testimony of one witness and the oath of the plaintiff is acceptable by the majority of the jurists in property disputes and related matters, though two witnesses are preferred. In contrast to universal testimony it is called isolated or single testimony since it lacks universal character or notoriety. Female matters can be established by one female witness in Islamic law.[22]

Article 17 of the Qanun-e-Shahadat lays down that one witness is acceptable in most of the matters, whereas section 134 of the Evidence Act permits one witness in all legal matters.

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[20] *Hedaya*, 1791, Vol. III, p. 119

[21] Kazi Motiur Rahman and others v. Din Islam 43 DLR 1991 HD 128 at p. 129

[22] Salama, 'General Principles.....' 1982 at p. 116; chapters 6.1.2 and 6.1.3 and 2.1.1

Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact.[23] The practice in the Courts of both Pakistan and Bangladesh is different than what it theoretically approves in the Qanun-e-Shahadat and the Evidence Act respectively. The cases decided in the Courts of Pakistan and Bangladesh are very cautious in accepting single testimony. It is often repeated that if one witness is fully reliable and trustworthy, conviction of an accused can be based upon such evidence,[24] but the Court, as a rule of prudence, does not base conviction on the evidence of such a witness unless the eye witness is absolutely reliable or unless his evidence is corroborated by reliable evidence.[25] Absolute reliability would mean where the presence of the witness at the time of occurrence is natural; his statement is consistent, the version of incident given by him is natural; his character is above suspicion; he has stood the test of cross examination and his testimony is unimpeachable;[26] he should be

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23 Shahidullah and another v. The State BLD 1987 AD 27 at p. 31

24 Shadat Ali v. State 44 DLR 1992 HD 217 at p. 221; Ataur Rahman and others v. The State 43 DLR 1991 HD 87 at p. 93; Javed Zaman v. The State 1990 P Cr. L J 1672 at p. 1676 [Peshawar]; Iftikhar Hussain and another v. The State PLD 1983 Peshawar 37 at p. 42 distinguished from Mumtaz-ud-Din v. The State PLD 1978 SC 114; Ezahar Sepai v. The State 40 DLR 1988 HD 177 at p. 182 following Yusuf v. Appellate Tribunal 29 DLR 1977 SC 211 at p.213; Ataur Rahman and others v. The State 43 DLR 1991 HD 87 at p. 92 Ashrafuddin v. The State 42 DLR 1990 HD 511 at p. 520; Isa and 3 others v. The State 1987 P Cr. L J 1551 at p. 1556 [Lahore]; Rab Rakhio and 2 others v. The State 1984 P Cr. L J 847 at p. 856 [Karachi]; Yusuf Sk. alias Sk Abu Yusuf v. Appellate Tribunal and another 29 DLR 1977 SC 211 at p. 213; Abdul Wahab and another v. The State 1985 P Cr. L J 771 at p. 772 [Lahore]

25 Iftikhar Hussain and another v. The State PLD 1983 Peshawar 37 at p. 42 following Mumtaz-ud-Din v. The State PLD 1978 SC 114; Ashrafuddin v. The State 42 DLR 1990 HD 511 at p. 520; Bulu v. State 45 DLR 1993 HD 79 at p.88 Sanawal Shah v. The State 1985 P Cr. L J 955 at p. 957 [Lahore]; Muhammad Amir Khan v. The State 1984 P Cr. L J 897 at p. 903 [Lahore]; Corroboration by the accused was found acceptable in Juma Khan and another v. The State 1984 P Cr. L J 1141 at p. 1150 [Lahore]

26 Shamsul Qamar alias Sepoy v. The State 1984 P Cr. L J 504 at p. 511 [Peshawar]

above reproach, interest, incompetence or subordination.[27] It is the duty of the Court to determine whether implicit reliance can be placed on such testimony without independent corroboration.[28] But even then, the Courts in almost all cases look at the surrounding circumstances of the case to fit in the testimony of a single witness.[29]

In Bulu v. State[30] the Court did not accept the solitary witness testimony as it could not be corroborated. The Court pointed out that three prosecution witnesses out of twelve were relatives and they could not be believed for their inconsistent versions.

An example of accepting solitary testimony in Bangladesh is the case of Abdul Quddus v. The State.[31] A girl of sixteen years was the solitary eye witness to the murder of her sister. She was the most natural, probable and competent witness in the case as she was the one reading in the same room as her sister when the murderer entered. She witnessed the entire occurrence and even in her cross examination the defence could not show any material discrepancy for which her ocular testimony should be disbelieved. Since she had deposed the entire incident from the beginning to the end the Court found it very difficult to discard her evidence only on the ground

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27 Ashrafuddin v. The State 11 BLD 1991 HCD 435 at p. 448

28 Shamsul Qamar alias Sepoy v. The State 1984 P Cr. L J 504 at p. 511 [Peshawar]

29 Abdul Hai Sikder and another v. The State 12 BLD 1992 AD 180 at p. 183; Zulfiqar Ahmad v. The State PLD 1986 SC 477 at p. 480; Abdul Sattar v. The State 1992 P Cr. L J 212 at p. 219 [Quetta] following Mumtazuddin v. State PLD 1978 SC 114, Mali v. The State 1969 SCMR 76, Ali Ahmed alias Ali Ahmed Mia v. The State PLD 1962 SC 102, Shah Wali v. The Crown 1971 SCMR 273, Muhammad Ashraf v. The State 1971 SCMR 473 and Allah Bakhsh v. Shammi and others PLD 1980 SC 225 at p. 227, decisions against this view PLD 1960 SC 387, 1972 SCMR 620, PLD 1973 SC 150, PLD 1973 SC 778 and 1973 SCMR 527

30 Bulu v. State 45 DLR 1993 HD 79 at p. 88

31 Abdul Quddus v. The State 43 DLR 1991 AD 234 at p. 239

that she was an interested witness and was a minor girl aged about sixteen years, because the law provides that a child witness can be relied if s/he is capable of understanding and replying to the question intelligently. But the Court corroborated the circumstantial evidence with her statement.

It may be noted here that the solitary child witness is considered an interested witness by the Court. It is evident that she is not interested witness within the definition offered in the last chapter although she is interested in the outcome of the case.[32]

Mst Shamim Akhter v. Fiaz Akhtar[33] is a case from Pakistan where the Court relied on the solitary testimony of a woman. A woman lodged a report that on the night between 17 and 18 May 1985 she, her sister and her son aged four and half years old were sleeping on the roof of the house. At 1.30 am two persons threw acid on her sister and her son. She saw the accused in the torch light and they were known to her before the occurrence. The accused were arrested after three days from the date of incident. Later it was discovered that the accuseds also had received burn injuries. The motive was that one of them had demanded the hand of her sister but it was refused by her father. Her sister died as a result of the injury after a little more than a month. The complainant was the only witness. The Court found her to be a natural and true witness. The Court observed that she was natural and coherent, therefore implicit reliance could be placed on the testimony of this witness. But the Court, before concluding about her reliability, corroborated her statement with circumstantial evidence and the dying declaration of her sister.

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[32]see chapter 4.1.1 and 4.1.1.1

[33]Mst Shamim Akhtar v. Fiaz Akhtar PLD 1992 SC 211

In Shakeel Ahmad v. The State,[34] in Pakistan a mother was the only eye witness of the dagger blows to her son, aged twenty years, which resulted in his death. There was no other direct evidence to corroborate her. The Court did not place reliance on the solitary statement of the mother to record conviction of the accused. The case failed, as observed by the Court, due to the negligence of the police officers and the law officers conducting the case, who for unknown reasons did not pursue the matter. In other words the circumstances and recoveries were not produced by these officers before the Court to substantiate her testimony.

If the solitary witness is of bad character or suspect of the crime no reliance can be placed on his testimony unless it is supported by corroboratory or confirmatory circumstances in material particulars.[35] Conviction can hardly be justified on the uncorroborated statement of a solitary hostile witness,[36] or a police officer,[37] or a witness of dubious nature.[38]

5.1.1.2 Tawatur : Universal testimony

In Islamic law the highest kind of oral testimony, with regard to its value as a proof, is known as Tawatur or universal testimony. Such proof consists of information given by such a large body of men that reason cannot conceive that they would combine in a falsehood or agree in an error.[39]

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[34] Shakeel Ahmad v. The State PLD 1987 Lahore 612

[35] Azeem Khan v. The State 1984 P Cr. L J 2720 at p. 2725 [Karachi]

[36] Hameed v. The State 1987 P Cr. L J 834 at p. 836 [FSC]

[37] Gaziur Rahman v. The State 11 BLD 1991 HCD 11 at p. 17; Khadim Hussain v. The State 1989 P Cr. L J 955 at p. 956 [Lahore]

[38] Abu Taher Chowdhury and others v. The State 11 BLD 1991 AD 2 at p. 20

[39] Mahmasani, Sobhi, *Falsafat al-Tashri fi al-Islam, The Philosophy of Jurisprudence in Islam* translated into English by F.J. Ziadeh, Beirut, 1946, p. 186; *The Mejelle* being an English translation of Majallahel-Ahkam-i-

It seems that Tawatur in Islamic law does not have an equal term in the present codified law of Pakistan and Bangladesh, but it could be equated in terms of probative value to the law relating to independent witness as established by precedent.[40] The Court is cautious enough to establish a fact through independent, natural and disinterested witness. In a case where the prosecution or the defence cites many witnesses of the locality, the Court prefers to pay heed to those local people rather than relatives or friends, as the universal character or notoriety of the event is established beyond reasonable doubt by those local independent witnesses.

In Ghulam Murtaza v. The State[41] a person was allegedly killed in a hotel. Although fifteen to twenty persons were present at the time of the incident, and forty to fifty persons gathered after the incident, the prosecution failed to produce even a single independent witness in support of the case. The only evidence produced was that of one major witness, who was related to the complainant, and a minor who was the son of the complainant and real cousin of the deceased, and whose statement was recorded two/three days after the incident. Because of the lack of any willing witness present at the time of the incident, who could have been a natural witness and therefore the best available evidence, no implicit reliance was placed on the uncorroborated interested eye witnesses testimony.

The prosecution case of Shamus Gul v. State[42] was founded upon the alleged oral dying declaration of the deceased before his father. The

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Adliya and a complete code on Islamic Civil law, translated by C.R.Tyser, D.G. Demetriades and Haqqi Effendi, Lahore, 1967, Art. 1676

40see chapter 4.1.2

41Ghulam Murtaza v. The State PLD 1989 Karachi 293 at p. 297 following Muhammad Sharif v. Tahirur Rahman 1972 SCMR 144 and Qabil Shah v. The State PLD 1960 Karachi 697

42Shamus Gul v. State PLD 1983 Peshawar 48 at p. 54; similar case Wazir v. The State 1982 P Cr. L J 81 at pp. 83-5 [Karachi]

son must have expired before the father arrived. The case failed because the incident had taken place in a crowded market place but not a single witness was produced to state that the deceased was alive at the time of the arrival of his father and was capable of charging all the accused in the given circumstances.

But if the Court is otherwise satisfied from other kinds of evidence to convict the accused, it may not pursue the procurement of independent witnesses. An example is the case of Ataur Rahman v. State[43] in Bangladesh. None of the independent witnesses who went to say prayer in the mosque near the vicinity of the place of occurrence of murder were examined. It was decided by the High Court that no particular number of witnesses are necessary to prove a case.

It may be noted that the Courts are aware of the fact that independent witnesses are not readily available to testify. In similar cases, as cited above the Courts have taken a lenient attitude.[44] In a case, when many people were in the room at the time of the incident but none tried to catch the accused out of fear of injuries, this was considered a valid ground to let the accused flee away.[45]

It may be noted that in cases in the early part of this century it was reported in the Fifth Report of East India Company Affairs that a rich man seldom could be convicted in criminal cases. If committed on the strongest positive testimony before the magistrate he would bring twenty witnesses on his trial to swear an alibi or anything else that may have suited his case. He could thereby escape due to

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43 Ataur Rahman v. State 43 DLR 1991 HD 87 at pp. 92-3

44 see chapter 3.2

45 Azhar Haider Shah v. The State 1986 P Cr. L J 1362 at p. 1366 [Lahore]

contradictions among the witnesses.[46] No such observation is found in the case law of Pakistan and Bangladesh of recent years. It can be added from personal experience that people do make a long list of witnesses in crimes in which it seems some sort of shrewdness is involved to drag out the litigation or to show contradictions among the witnesses.[47] It is not known whether this practice has developed from the idea of universal testimony as applicable during Muslim India.

5.1.1.3 More than one witness

In Islamic law two male witnesses are required for Hudud and Qisas except Zina and Zina bil jabr offences. For other kinds of cases two witnesses are preferred. To prove a case of Zina and Zina bil jabr four eye witnesses are necessary.[48] This part of Islamic law is also confirmed by the Hudud Ordinances in Pakistan.

In Pakistan and Bangladesh, in some matters two witnesses are required by law, for example, for search of a place under section 103 of the Code of Criminal Procedure Code,1898, to enter a contract of marriage under the Muslim Family Laws Ordinance, 1961 in Pakistan and under Marriage and Divorce Registration Act, 1974 in Bangladesh etc. Most of the financial matters or contracts having prescribed form require at least two witnesses, e.g. Bank, Notary Public, etc. For wills two executors are needed as witnesses.[49] Though all other cases could be decided on the testimony of single witness,

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46Firminger, Walter Kelly (ed.), *The Fifth Report of the East India Company Affairs, 1812*, Calcutta, 1917-18, re. New York, 1969, Vol. II, p. 605

47 see chapter 1.4 for personal experience

48Salama, 'General Principles....' 1982 at p.116; Article 8 of Zina Ordinance

49Chaudhury, Abdul Wahid, *The Hedaya on Gifts and Wills*, Lahore, 1979, pp. 73-75

the Courts seldom do so and it is often that there is more than one witness present in each case.

Example of the testimony of two witnesses would be the case of Muhammad Sabir v. Muhammad Akram.[50] This is a Federal Shariat Court judgement from Pakistan. In this case of sodomy the Court based its judgement on the testimony of the victim and the doctor. The victim gave an account of the manner in which the offence was committed and those who participated while the doctor corroborated the fact that marks of violence were present on his body as in sexual violence. It seems that the victim was considered as a witness in the Shariat Court though in Islamic law, in strict legal sense a party to the case is not a witness. The case was established by the testimony of the victim, corroborated by the testimony of expert evidence.

In Muhammad Ishaque v. The State[51] the dispute occurred when the appellant demanded the hand of the daughter of the deceased in the name of his son. The son was a minor and also mentally handicapped. The Court examined the depositions of the two eye witnesses to the murder, who were brothers *inter se* and sons of the deceased. The statements in cross examination are found to be consistent and convincing by the Court. The Court believed in their testimony and also took note of the recovery evidence.

The case of Abdul Malik v. The State[52] is that the Excise Inspector, on receiving spy information, searched the person of the accused and found in his possession 7,700gm of charas (narcotic drugs) concealed in his garments. The Court found that all the three eye witnesses were in consonance with the probabilities. It agreed with the other

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50 Muhammad Sabir v. Muhammad Akram and others PLD 1987 FSC 38 at p. 42
51 Muhammad Ishaq v. The State PLD 1992 SC 248 at p. 249
52 Abdul Malik v. The State PLD 1985 FSC 293 at p. 295

evidence so as to inspire confidence of truth inasmuch as no enmity was proved or ever suggested against them. This was further supported by the report of the chemical examiner.

It is to be noted that in both Pakistan and Bangladesh the Courts always corroborate the testimony of eye witnesses with circumstantial evidence or other evidence. There is hardly any case in which Pakistan or Bangladesh have passed judgement solely on eye witness testimony.

It is also to be noted that until now not a single Hadd punishment has been implemented by the testimony of the minimum number, two or four witnesses. If the quantitative aspect of the testimony was satisfied the qualitative aspect was not.

5.1.2 Quality vs. Quantity

Islamic law puts forward a procedure of proof which is both quantitative and qualitative, in particular in grave offences like Hadd and Qisas.[53] It does not see any antipathy between quantitative and qualitative testimony. Qualitatively, as mentioned in the third chapter, a witness must have both cognitive and motivational credibility, since cognitive ability ensures motivational credibility. In theory, in terms of quantity the motivational credibility would reach the probative value required by Islamic law. By this, theoretically, the qualitative and quantitative aspect of proof in Islamic law can be weighed in terms of probative value. The persuasive power of one witness may be more than the other. There is no hard and fast rule to scale the persuasive power of testimony. Jeremy Bentham has a fundamental approach to the question of

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[53] Haider Hussain and others v. Government of Pakistan and others PLD 1991 SC 139 at p. 172

assessing probative force of evidence. The degree of confidence a person ought to have in a given statement is determined by logical rules. These logical rules are strategies for the direction of mind in a pragmatic manner.[54] The traditional Islamic law of procedure is quite strict and detailed on matters of judicial uprightness and the correct assessment of valid witnesses.[55] If the number of witnesses falls short from the required number of witnesses for Hadd, the judge may send the accused to ordinary Court under ordinary law[56] or punish the accused with Tazir punishment by weighing the probative value of the witnesses statement by the ordinary logical rules. For the same reason in cases of Zina and Zina bil jabr the law of Sharia places emphasis on the quality and also the quantity of the evidence[57] to confirm whether Hadd punishment could be inflicted. The provision of article 17 clause 1 of the Qanun-e-Shahadat provides that the competence of a person to testify and the number of witnesses required in a case are to be determined in accordance with the injunctions of Islam as laid down in the Qur'an and the Sunna. The article is not exhaustive because it enjoins a judge or a Qazi to find out for himself from the Holy Qur'an and Sunna the competence and number of witnesses in a given case.[58] On the surface article 17 seems not to have a significant impact on legal practice or interpretation.[59] because of the Courts of Pakistan deciding cases under the rules of Tazir. Under article 17 volume and

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54Postema, 'Facts, Fictions .....' 1983 at p. 59

55Lev, Daniel S. *Islamic Courts in Indonesia A study in the Political bases of Legal Institutions*, London et al, 1972, p. 127

56Ghulam Rasool Mir v. Azad Government of the State of Jammu and Kashmir and others 1983 P Cr. L J 298 at p. 304 [Azad J&K]

57Muhammad Akbar v. The State 1985 P Cr. L J 2826 at p. 2829 [FSC]

58Muhammad Nadeem v. The State 1992 P Cr. L J 1520 at p. 1533 [Supreme Appellate Court]

59Kennedy, Charles H., 'Islamisation and ..... ' 1990 at p. 69

the weight of the evidence may be considered together but if there is conflict between the two, the quantity will certainly give way to quality.[60] In other words, Hadd punishment will give way to Tazir punishment. To inflict Hadd punishment the required number of truthful witnesses must remain present. This criteria of certain number of witnesses is not a pre requisite to inflict Tazir punishment. Therefore, the Court can in theory convict an accused person on the testimony of one dependable witness. Proof of a fact would depend upon the character of the witnesses and their competency to speak to that fact.[61]

As a result, for the administration of criminal justice under article 17 of the Qanun-e-Shahadat for Tazir offences, and section 134 of the Evidence Act, the quality of evidence and not the quantity is important[62] as regards the truthfulness and reliability of evidence.[63] As a rule witnesses are weighed and not counted.[64] It is not often that a crime is committed in the presence of only one witness. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness could be available in

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[60] Mohabbat v. The State 1990 P Cr. L J 73 at p. 77 [Karachi]

[61] Rab Nawaz and others v. The State 1991 P Cr. L J 826 at p. 828 [Lahore]

[62] The State v. Lal Khan 1992 P Cr. L J 483 at p. 487 [Lahore] referring to article 70 of the Qanun-e-Shahadat; Safiuddin and others v. Minhajuddin Chowdhury and another at 12 BLD HCD 1992 301 at p. 304; Rab Nawaz and others v. The State 1991 P Cr. L J 826 at p. 828 [Lahore]; Md. Joynal Abedin v. The State BLD 1991 HCD 70 at p. 73; Zulfiqar Ali alias Dittu and another v. The State 1991 P Cr. L J 1125 at p.1129 [Lahore]; Arshad Mahmood v. The State 1984 P Cr. L J 1827 at p. 1829 [Lahore] Muhammad Yausaf alias Babu v. The State 1984 P Cr. L J 1992 at p. 1995 [Lahore]; Sher Ali v. The State 1985 P Cr. L J 349 at p. 456 [Lahore]; Khalid and another v. The State 1983 P Cr. L J 761 at p. 766 SC (AJ&K) following Muhammad Hassan v. The State PLD 1982 Lah 547 at p. 583 and Allah Bakhsh v. Shammi and others PLD 1980 SC 225 at p. 227; Abdul Nasir v. The State 1980 P Cr. L J 898 at p. 901 [Lahore]

[63] Ilyas v. The State 1981 P Cr. L J 83 at p. 89 [Karachi]

[64] Muhammad Abdullah v. The State 1985 P Cr. L J 1580 at p. 1586 [Lahore]

proof of the crime would go unpunished.[65] There is no provision in law which makes it mandatory that conviction cannot either be recorded or maintained on the solitary statement of an eye witness.[66]

5.1.3 Retraction of Testimony

In Islamic law retraction of testimony before the starting of the case may reduce the required number of witnesses thereby shelving off the case itself. In Zina and Zina bil jabr cases retraction of testimony should attract Qazf punishment at any stage. If retraction of testimony takes place during the pendency or hearing of the case or before the order is passed it must be made in the Court. If retraction is properly made, the evidence will be rejected. If not made in Court no notice will be taken of the retraction.[67] If the retraction is made after the judgement is passed it will not affect the Court's order unless such evidence has caused miscarriage of justice for which the witness will be held liable.[68] Though the Hudud Ordinance relating to Zina and Qazf in Pakistan deals with retraction of testimony, it does not say that retraction of testimony from Zina or Zina bil jabr would attract Qazf punishment.

The concepts of hostile witness testimony, and reneging on statements are recognised by the Courts of Pakistan and Bangladesh. In a Pakistani case law the Judge only warned the police officers against bringing false charges for which disinterested witnesses are compelled to renege on their statements, in order to shield the

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65 Muhammad Yausaf alias Babu v. The State 1984 P Cr. L J 1992 at p. 1995 [Lahore]

66 Arshad Mahmood v. The State 1984 P Cr. L J 1827 at p. 1829 [Lahore]

67 Mahomadullah, 1926, p. 121

68 Mahomadullah, 1926, p. 88

innocent party from being saddled with major punishments and to prevent the judge's mind being directed in the wrong channels or forming wrong impressions.[69] The codified law in Pakistan and Bangladesh is not as explicit as Islamic law but the recognition by itself of hostile witness and renege on of statement shows that in effect the general law toes the line of Islamic law.

5.2 Iqrar: Admission : Confession

5.2.1 Iqrar: Admission

In Islamic law when a man testifies against himself in support of a claim made against him, it is called Iqrar. Iqrar means both admission and confession.[70] Although according to the Islamic law Iqrar or acknowledgement in general stands upon much the same footing as an admission as defined in the Qanun-e-Shahadat and the Evidence Act, acknowledgement of parentage and other matters of personal status stand upon a higher footing than matters of evidence and form a part of the substantive Islamic law.[71]

Admission is defined as a statement, oral or documentary, made in certain circumstances referred to in article 43 of the Qanun-e-Shahadat and section 30 of the Evidence Act, and suggesting an inference to any fact in issue or relevant fact. For example an admission made by a party in a plaint is admissible as evidence against him in other actions or suits but such admissions cannot be regarded as conclusive proof and it is open to the party to show that

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69 Abdul Ghani v. State PLD 1982 Lahore 154 at p. 160

70 Salama, 'General Principles....' 1982 at p. 119

71 Bashir and others v. Ilam Din and others PLD 1988 SC 8 at p. 12; Mian Aziz A. Sheikh v. The Commissioner of Income-Tax Investigation, Lahore PLD 1989 SC 613 at pp.623-4 citing Mahmood J. in Major Sher Afzal vs. Shamim Firdaus and another PLD 1980 SC 228 at p. 267

they are untrue[72] or are the result of *bonafide* mistake of fact.[73] If the person concerned never had an idea or intended to use a statement as an admission in a litigation it is unfair to use it as an admission.[74] An admission is admissible *proprio vigore* and is given in evidence as substantive evidence and not for contradiction purpose.[75]

In the case of Haque Brothers Ltd. v. Bangladesh Shilpa Rin Sangstha[76] it was decided that the legal position of a letter written by the appellant with the words "without prejudice" is to be understood with reference to section 23 of the Evidence Act. It was ruled that the letter written by the appellant could not be used to determine the extent of his liability, but insofar as it showed the relationship between the appellant and respondent as primarily that of debtor and creditor, and that they had tried to settle the account, the letter could be taken into consideration.

5.2.2 Iqrar: Confession

In Islamic law confession is the admission by the accused of having committed the act that incurs punishment. The confessor must be of age, mature, sane, capable of self expression and acting of his own free will. The Hanafis maintain that the accused must repeat the confession the same number of times as the number of witnesses required.[77] Hanafi School only accepts judicial confession whereas

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72 Abdul Kader Khan v. Basek Khan 40 DLR 1988 AD 114 at p. 116

73 Begum Khodeza Akhter v. Hajera Khatun and others 37 DLR 1985 AD 212 at p. 215

74 Haque Brothers Limited and others v. Shamsul Haque and others 39 DLR 1987 HD 290 at p. 297

75 Birendra Chandra Saha v. Sashi Mohan Saha 27 DLR 1975 AD 89 at p. 92

76 Haque Brothers Ltd. v. Bangladesh Shilpa Rin Sangstha 37 DLR 1985 AD 54 at p. 59

77 Salama, 'General Principles....' 1982 at pp. 116-9

the other three Sunni schools accepts extra judicial confession in the presence of at least two witnesses.[78]

Confession is not defined in the Qanun-e-Shahadat or the Evidence Act, but ordinarily it is construed as an acknowledgement in express words, by an accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. Article 43 of the Qanun-e-Shahadat explicitly excludes an exculpatory statement from consideration.[79] A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed.[80] Confession must either admit, in terms of the offence or at any rate substantially, all facts which constitute the offence.[81] A confession as a general rule of law is receivable as a testimony or as an admission which is admissible against its maker[82] although not recorded on oath.[83]

Article 43 of the Qanun-e-Shahadat and section 30 of the Evidence Act, do not specify the form the confession may take. It may be judicial or extra judicial. Judicial confession is one which is recorded in the manner laid down by sections 164 and 364, Code of Criminal

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78Salama, 'General Principles....' 1982 at pp. 119-120

79Spin Bacha and another v. The State PLD 1990 FSC 57 at p. 60; It would therefore include the corresponding section 30 of the Evidence Act.

80Zulfiqar Ali Bhutto v. State PLD 1979 SC 53 at p.106 following Sant Ram v. Emperor AIR 1924 Oudh 188, Sheocharan v. Emperor AIR 1926 Nag 117, Raghunath v. Emperor AIR 1926 Nag 119, Abdul Jalil Khan and others v. Emperor AIR 1930 All 746, Shambhu v. Emperor AIR 1932 All 228 Ram Bharose and others v. Rex AIR 1949 All. 132 and Zahid Hassan Khan and others v. The State PLD 1964 Dacca 600; Syed Ali Shah alias Shahji v. The State 1993 P Cr. L J 1118 at p. 1122 [Karachi]

81Abdul Wahab and another v. The State BLD 1986 HCD 390 at p. 398; Abdul Jalil and others v. The State BLD 1985 HCD 137 at pp. 141-2

82Sher Muhammad alias Shera and another v. State PLD 1984 Lahore 155 at p. 161

83Jan Muhammad v. The State 1986 P Cr. L J 17 at p. 19 [Karachi]

Procedure,1898 while the extra judicial confession may take the form of a document or other statement recognised by precedent. Such a document may be filed as the statement made in the course of the trial.[84]

In Islamic law according to the Hanafi School of thought, confession must be judicial, therefore making it direct evidence or testimony in the common law sense. In Pakistan article 44 was incorporated in the Qanun-e-Shahadat in 1984, making the accused liable to be cross examined. Section 340 of Criminal Procedure Code, 1898 was amended in 1985 which as clarified by case law contemplates that an accused person shall, if he does not plead guilty, give evidence on oath in disproof of charges or allegations made against him. The requirement in the proviso, as was available before the amendment, to the effect that an accused shall not be called as a witness except on his own request is omitted and is conspicuous by its absence. There are many case law of the proposition that after amendment of 1985, under section 340(2) of the Code of Criminal Procedure it is mandatory for the Court to record the statement of an accused on oath and it is further mandatory for the accused to have such a statement recorded on oath.[85] The trial of the case is not complete until the accused has given evidence personally on oath to meet the

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84 Zulfiqar Ali Bhutto v. State PLD 1979 SC 53 at p. 108

85 Arshad Mehmood v. The State 1989 P Cr. L J 574 at pp. 582 and 584 [Karachi]; Muhammad Qasim v. State PLD 1986 Quetta 286 at p. 289; Jan Muhammad v. State 1987 P Cr. L J 2302 at pp. 2304 and 2306 [Karachi], Jan Muhammad v. State Cr. Appeal No. 86 of 1985, Noor Muhammad v. State Cr. Appeal No. 214 of 1987, also see Muhammad Siddique and another v. State PLD 1983 FSC 173 at p. 183, Mst Sultan Zari v. State 1986 P Cr. L J 1723 at p. 1727 [FSC], Abdul Malik v. State PLD 1985 FSC 293 at p. 297; Rizwan v. State PLD 1986 Lah 222 at p. 229; Mst Ameer Khatoon v. Faiz Muhammad and others 1986 SCMR 1182 and Saeedullah alias Bacha v. State 1988 P Cr. L J 19 at p. 26 [Peshawar]

requirement of section 340(2).[86] It seems that it is considered a duty of the accused to help the Court to discover the truth in the spirit of the present legal, constitutional, judicial and Islamic ethics in Pakistan[87] The decisions assert that section 340(2) is not in conflict with article 13(b) of the Constitution for the reason that the section does not contemplate and intend the accused to be a witness against himself.[88] Article 13(b) of the Constitution of Pakistan ensures that no person shall, when accused of an offence, be compelled to be a witness against himself. The same assurance appears in article 35(4) of the Constitution of Bangladesh. It is yet to be seen how much the Court of Pakistan is abiding by this fundamental right. The amendment in Bangladesh, it seems apparently, is not until now in conflict with this right.

The amendment of section 340 of the Criminal Procedure Code, 1898 in Bangladesh in 1978 is more explicit. It clearly says that an accused could be a competent witness for his defence and he will only be called as a witness on his own request.

Section 340 of the Code of Criminal Procedure, 1898 was first amended in 1923[89] to provide a limited right to the accused to give testimony. In non warrrantable and non cognizable offences the accused could offer himself as a witness. This rule was applicable in both wings of Pakistan, i.e. Pakistan and Bangladesh of today. At present the amendments differ in the two countries as stated above. It is to be noted that in traditional Islamic law the parties to the case are not considered as witnesses, though in certain matters the party is

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[86] The State v. Mukamil Shah 1990 P Cr. L J 1692 at p. 1693 [Peshawar]; Jan Muhammad v. The State 1987 P Cr. L J 2302 at pp. 2304 and 2306 [Karachi]

[87] Shah Wali and another v. The State PLD 1993 SC 32 at p. 34

[88] Arshad Mehmood v. The State 1989 P Cr. L J 574 at p. 584 [Karachi]

[89] S. 29(2) of Act XVIII of 1923

considered as a substitute for the witness, as in property matters. It is known that the present situation in Pakistan and Bangladesh is that parties are expected to appear as their own witnesses so that the opposite party has the opportunity to cross examine them. The recent development in the case law of Pakistan, in Mst. Umran Jee v. District Judge, further to this is, contrary to the practise in Bangladesh,[90] that a party cannot be forced to appear as a witness and thereby the party is under no obligation to tender himself for cross examination by the opposite party. The powers of court to summon any person to give evidence or produce document do not extend to summoning a party as a witness. It is also pointed out in the judgement that there is no provision in the Evidence Act or the Code of Civil Procedure, 1908, whereby a party to a suit is under obligation to appear as his own witness and tender himself for cross examination.[91] It is clear from section 340 of the Code of Criminal Procedure applicable in Pakistan that it is obligatory on the accused to appear as a witness. Therefore there is a conflict between the decision made in Mst. Umran Jee v. District Judge and section 340 of the Code of Criminal Procedure.

It seems that section 340 read with section 342 of the Code of Criminal Procedure in its present form, would qualify the accused both in Pakistan and Bangladesh as a privileged witness in the narrow sense. Section 342 deals with the right of the Court to examine the accused at any stage of any inquiry or trial without previously warning him. The accused will not be liable to punishment by refusing to answer questions or by giving false answers. The Court

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[90]The practise in Bangladesh is checked by talking to a lower court judge who deals with summoning the witnesses.

[91]Mst Umran Jee v. District Judge, Kohat and 3 others PLD 1990 Peshawar 100 at pp. 102 and 104

may take into consideration any answer given by the accused to put in evidence for or against him, or infer from the refusal to answer as seems just. It means that if the accused refuses to give evidence on the witness stand he cannot be considered liable and he will not be prosecuted for giving false evidence. This right is similar to the right of silence in English law. Although the accused will not be asked incriminating questions it seems that once the accused appears in the Court as a witness any confession made by him would be direct evidence. The Court should in fact draw the attention of the accused to his confession while examining him under section 342 of the Code of Criminal Procedure.[92] The main object of section 342 is to give the accused an opportunity to show his innocence. It is the duty of the Court to place before the accused facts appearing against him so that the accused could explain them.[93] It is not clear yet whether the accused in Bangladesh could invoke the phrase, in section 340, that the 'accused could be a competent witness for his own defence' suggesting that confession or any statement regarding a confession in the Court is beyond his defence. In this regard it may also be noted that an incriminating statement made by the accused under oath in another case in his deposition before a Court of Justice can be used against him on his trial on a criminal charge.[94] On the same principle it can be argued that if an accused makes a voluntary statement in Pakistan and Bangladesh, in the context of section 340 and 342 of the Code of Criminal Procedure while deposing, it could be considered as a confession in a deposition thereby making it direct evidence.

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[92] Safar Ali and others v. The State 36 DLR 1984 HD 185 at p. 188

[93] A S M Afzal Hossain v. The State 28 DLR 1976 HD 103 at p. 106

[94] Chaudhuri, Prasanna Narayan, *Confession and the Evidence of Accomplices* 2nd ed., Calcutta, 1910, p. 136 referring to R v. Gopal Doss I.L.R. 3 Mad 271

Neither in Pakistan nor in Bangladesh has the law of confession changed except that in Pakistan confession made in front of a magistrate is not acceptable for Hadd offence. Confession, in offences punishable with Hadd, must be made in front of a sessions judge in Pakistan. This is construed from case law.[95] The statutory amendments made in the Hudud Ordinances do not explicitly say that a confession in front of a magistrate is void. It only mentions that offences punishable with Hadd is triable by a Sessions Court.[96] It is nowhere clear in the statutes of Pakistan except case law that confession for Hadd offence must be direct, i.e. in an open Court as required by Islamic law especially the Hanafi School of thought. It is possible that one accused of a Hadd offence confesses to a sessions judge yet, that will be considered hearsay evidence, similar to a confession for any other offence in front of the magistrate.

It is not clear whether the judges are consciously following the other schools of thought which also allow confession outside the Court. Or is it possible that the judges are getting acquainted with the concept of Tazir offence and do not see a danger of invoking Hadd

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[95] Muhammad Naseer v. The State PLD 1988 FSC 58 at pp. 74-5

[96] Article 2 of the Prohibition (Enforcement of Hadd) (Amendment) Order 1980, President's Order No. 5 of 1980 amended article 27 in the Prohibition (Enforcement of Hadd) Order, President's Order No. 4 of 1979 in respect of article 8 dealing with drinking liable to Hadd; Article 3 of the Offences Against Property (Enforcement of Hudood) (Amendment) Ordinance, 1980, Ordinance XIX of 1980 amended article 24 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, Ordinance VI of 1979 in respect of article 9 and 17 dealing with theft and harabah liable to Hadd punishment respectively; Article 2 of the Offences of Zina (Enforcement of Hudood) (Amendment) Ordinance, 1980, Ordinance XX of 1980 amended article 20 of the Offences of Zina (Enforcement of Hudood) Ordinance, 1979, Ordinance VII of 1979; and Article 2 of the Offence of Qazf (Enforcement of Hadd) (Amendment) Ordinance, 1980, Ordinance XXI of 1980 amended article 17 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, Ordinance VIII of 1979 in respect of article 7 dealing with Qazf liable to Hadd and article 14 dealing with lian procedure and acceptance by wife of accusation of Zina by the husband.

punishment for which it hardly matters whether confession is made inside the Court or outside the Court.

In Islamic law a single confession is equated with one testimony and therefore, where more than one testimony is required by an express provision, the stipulated sentence or penalty for it cannot be imposed unless the confession is repeated for the required times. There is the further stipulation that confession in one sitting is to be taken as one, even though repeated a number of times, and that the confessor should be taken out of the sight of the Qazi before he reappears for making another.[97] There is no such provision in the Qanun-e-Shahadat, Hudud laws or the Evidence Act.

The conditions for accepting confession as admissible evidence against the persons making it are much more severe and strict according to the Sharia, specially because Hadd punishment can be inflicted upon the accused solely on confession.[98] The principles are__

The confession must be made without fear, promise or pressure and it is the duty of the Qazi to be satisfied with it .

In order to ascertain the above, the Court must allow the accused time and opportunity and to have legal advice, and must also explain the legal consequences of confession.

The Court must verify that the man is not sick or insane and is in a fit state of mind.

The confession must be made four times and at different sittings so that the accused is out of the sight of the Court and away from the

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97Mst Bakhan v. The State PLD 1986 FSC 274 at p. 279

98Ghulam Hassan and another v. The State PLD 1983 FSC 497 at p. 505

police or parties' pressure before coming back for subsequent confessions to the Court in Hadd offences.[99]

The Federal Shariat Court in Liaqat Bahadur v. State,[100] following the general trend in Pakistan, reminded that apart from the set questions the magistrate is advised by the Courts to ask the following questions to the alleged accused:-

For how long have you been with the police?

Has any pressure been brought to bear upon you to make a confession?

Have you been threatened to make a confession?

Have any inducement been given to you?

Have you been told that you will be made an approver?

Why are you making this confession?

In criminal jurisprudence as developed in Pakistan and Bangladesh the subject of confession has been regarded as very delicate. Since the probative value of a confession is very high, if it is proved as voluntarily made by the person confessing, then conviction based upon it may follow immediately and the Courts are not required to look for corroborative evidence anywhere else in a case. Although as an extra caution the judges look for other facts so as to assure themselves that the confessional statements happen to be voluntary. The proper course for a magistrate to record a confessional statement is immediately on the accused's appearance in Court, his handcuffs should be removed, all the police officers should be turned out from the Court room. Thereafter he should inform the

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99Mst Bakhan vs. The State PLD 1986 FSC 274 at p. 281 Muhammad Sarwar and another v. The State PLD 1988 FSC 42 at p. 51; Muhammad Hussain v. The State 1987 P Cr. L J 547 at p. 550 [FSC]

100Liaqat Bahadur and others v. The State PLD 1987 FSC 43 at p. 49 following Division Bench of the Lahore High Court in Said Begum v. The State PLD 1958 Lah 559

accused that he is a magistrate and a statement made before him may be used against the maker; that the accused is not bound to, or obliged to make any statements; he will not be returned to the police custody but will be remanded to the judicial lock up. The accused should then be given sufficient time to think over the matter. There is no absolute rule as to the time to be given to the accused for reflection before confession.[101] In order to ensure that the accused understood the proceedings, the magistrate should put questions to the accused to find out as to why the latter was making the statement, whether voluntarily or on promise or under pressure. Questioning is permissible to ascertain the voluntary nature of the statement. Thereafter the magistrate is to allow the accused to make statement in his own way.[102] The omission of disclosing the identity of the magistrate diminishes the value of the confession.[103] The magistrate before proceeding to record a confessional statement must assure himself and satisfy his own judicial conscience about it. A mere statement of satisfaction by the magistrate does not prove the confessional statement as voluntary.[104] Experience of magistrates in recording confession is considered positive by the Courts.[105] In a case from Bangladesh it was decided by the Appellate Court that there is no requirement in law to inform the accused that he will not be sent to the police custody. If a magistrate has any reason to

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[101] Ratan Khan alias Rattan and others v. State 40 DLR 1988 HD 186 at pp 190-1; In Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 616 [Karachi] 1.45 hours was given for reflection and the accused was produced within 4 hours of arrest. The time was found to be insufficient.

[102] Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi]; Muhammad Amin v. The State 1982 P Cr. L J 953 at p. 959 [Lahore]

[103] Jan Muhammad v. The State 1986 P Cr. L J 17 at p. 19 [Karachi] following PLD 1966 Kar. 242

[104] Abdul Wahab and another v. The State BLD 1986 HCD 390 at p. 399

[105] State v. Muhammad Haroon and 2 others 1988 P Cr. L J 781 at p. 794 [Karachi]

believe that the accused is apprehensive of the police or that the police might have tortured or prevailed upon him during custody he may assure the accused by telling him.[106] This decision seems to be a misinterpretation of the law, although from the Appellate Court of Bangladesh. The correct position is recently laid down by the High Court as *obiter dicta* that in fact the prisoner should be warned that he will not be sent back to the police custody.[107]

It is decided by the High Courts of Bangladesh that when the confession has been recorded in accordance with law by observing all the formalities prescribed by the law, it proves itself when tendered in the Sessions Court under section 80 of the Evidence Act without calling the magistrate who recorded it.[108] Two requirements for admitting such confession into evidence are that it was taken in accordance with law and that the identity of the accused has been satisfactorily proved.[109] Section 533 of the Code of Criminal Procedure makes it clear that a magistrate who has recorded a confession or other statement of an accused under sections 164 or 364 of the Code of Criminal Procedure need not be examined by any Court. Only when it found that the provisions of recording of the statement has not been complied with by the magistrate, the Court will take evidence of him.[110] But in a recent decision the Appellate Court of Bangladesh ruled that the accused should be given a chance to cross examine the magistrate who recorded the confession.[111] It is to be pointed out that statements made under section 164 of the Code

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[106] Dipok Kumar Sarkar v. The State BLD 1988 AD 109 at p. 112

[107] The State v. Md. Kibria @ Shahjahan 43 DLR 1991 512 at pp. 514-5

[108] Ismail Sarkar v. State 33 DLR 1981 HD 321 at p. 325

[109] Md. Emran Ali and others v. The State BLD 1985 HCD 95 at p. 100

[110] Emran Ali alias Md. Emran and others v. State 37 DLR 1985 HD 1 at pp. 5-6

[111] Babul alias Abdul Majid Khan and others v. The State 42 DLR 1991 AD 186 at p. 188

of Criminal Procedure is not substantive evidence.[112] It will follow from here that statements made under section 364 would also not be substantive evidence.

The precedent that is established by the Courts in Pakistan and to a limited extent by the Courts in Bangladesh regarding the admissibility of a confession are :

1. The confession must be voluntary.[113]

To ascertain the voluntary nature of confession, the magistrate is required to make a real endeavour with great care and caution.[114] To reach that end, the set questions, as reminded by the Shariat Court of Pakistan mentioned above in Liaqat's case, or questions prescribed by the High Court circulars,[115] and then the questions as are given in the printed form,[116] must be asked. In judging the probative value of a confession the following circumstances were considered to be essential in the case of Wali Muhammad alias Nandhoo v. The State [117] :

the character and duration of custody;

whether the confessor was placed in a position to seek advice of his relatives or lawyers;

the nature and *quantum* of proof which was available against the confessor before he confessed;

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112 Khasru alias Khorshed v. The State 35 DLR 1983 HD 119 at p. 123; Ismail Sarkar v. State 33 DLR 1981 HD 321 at p. 325

113 Sher Muhammad v. State PLD 1984 Lahore 155 at pp. 160-1; Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65

114 Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65 following Nazir Ahmed v. The King Emperor AIR 1936 PC 253; Habibur Rahman v. The State BLD 1988 HCD 210 at p. 215

115 Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65

116 Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi]

117 Wali Muhammad alias Nandhoo v. The State 1986 P Cr. L J 1153 at p. 1156 [Quetta] following Fazlur Rehman v. The State PLD 1960 (W.P.) Pesh 74

whether the confession was consistent with the other evidence which was available at the time when the confession was made. Confession cannot be recorded on oath. If oath is administered to an accused, the element of fear and compulsion comes in and the confession becomes irrelevant and inadmissible.[118] Handcuffs must be removed before recording confession.[119] If the accused is tempted to make a confession, such confession is irrelevant.[120] The word voluntary in respect of a confession means a confession not caused by inducement, threat or promise[121] If the magistrate puts incriminating questions where the accused was virtually interrogated, cornered and pinned down to the offence, the confession is not made without fear or promise, nor is it in accordance with the salutary provisions and the law.[122] The voluntary nature of the confession should be to the satisfaction of the trial Court and not the magistrate.[123] Truth and voluntary nature of the confessional statement should be verified in each case.[124]

2. Usually, confession recorded after a delay of twenty four hours from the time of arrest is not considered voluntary in Pakistan and Bangladesh, if during that time the person charged remained in police custody.[125] In recording a confession, circumstances may

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[118] Jan Muhammad v. The State 1986 P Cr. L J 17 at p. 19 [Karachi] following PLD 1956 SC 420 and PLD 1971 Kar. 211

[119] State v. Muhammad Haroon and 2 others 1988 P Cr. L J 781 at p. 794 [Karachi]

[120] Sarfaraz Khan v. The State 1985 P Cr. L J 167 at p. 170 [Peshawar]

[121] Akhtar Muhammad v. The State 1985 P Cr. L J 1118 at p. 1123 [Quetta] following State v. Minhun alias Gul Hassan PLD 1964 SC 815

[122] Muhammad Amin v. The State 1982 P Cr. L J 953 at p. 959 [Lahore]

[123] Amjad v. The State 1987 P Cr. L J 1773 at p. 1787 [Peshawar]

[124] Mahidur alias Mahidul Islam and others v. The State BLD 1983 HCD 162 at pp. 165-6

[125] Ghulam Abuzar and another v. The State 1991 P Cr. L J 697 at p. 704 [Karachi], confession was recorded four months after arrest; Sher Muhammad

justify a brief delay but not a long delay which if not explained leads one to infer that all time was utilised in extracting a confession from the confessor. An unexplained delay of more than twenty four hours in recording a confession would make the confession inadmissible.[126] Brief or *simpliciter* delay has not been explained in the case law. In one case in Pakistan, a delay of thirty-three hours was considered not unreasonable[127] and in another four days was

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v. State PLD 1984 Lahore 155 at p. 161, confession was made after 14 days; Muhammad Hussain v. The State 1987 P Cr. L J 547 at p. 550 [FSC], confession was made two weeks after the arrest; State v. Ishaque 1980 P Cr. L J 597 at p. 598 [Karachi], confession was made after 10 days; Salim Khan and another v. The State 1991 P Cr. L J 1950 at p. 1958 [Karachi], confession was made 8 days after arrest following Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 and Tooh v. The State 1975 P Cr. L J 440; Abdul Baqi and others v. State PLD 1986 Quetta 193 at p. 197, confession was made after 8 days from the day of arrest, following Naqibullah and another v. The State PLD 1978 SC 21, State v. Ishaque 1980 P Cr. L J 597 and Khan Muhammad and another v. The State 1981 SCMR 597; Amjad v. The State 1987 P Cr. L J 1773 at p. 1787 [Peshawar], confession was made 7 days after arrest; Liaqat Bahadur and others v. The State PLD 1987 FSC 43 at p. 50, confession was made after 7 days ; Arif Nawaz Khan and 3 others v. The State PLD 1991 FSC 53 at p. 65, confession was made after 6 days; Farooq Khan v. The State 1989 P Cr. L J 1520 at p. 1525 [Peshawar], confession was made several days after remaining in illegal custody; Miskeen v. The State 1983 P Cr. L J 1113 at p. 1115 [Peshawar], confession was recorded after 4 days; Abdul Hamid v. The State PLD 1980 Peshawar 25 at p. 32, confession was made 4 days after arrest; Karam Din and another v. The State 1989 P Cr. L J 8 at pp. 15-6 [Karachi], confession was made 3 days after arrest; Safar Ali v. The State 36 DLR 1984 HD 185 at p. 187 the condemned prisoner was in police custody for 3 days before making the confession; Syed Abid Hussain Shah v. The State 1983 P Cr. L J 882 at p. 885 [Karachi] confessional statement was recorded after 3 days of arrest; Hamzo and another v. The State 1983 P Cr. L J 892 at p. 896 [Karachi] confession was recorded 3 days after arrest; Farid Karim v. The State 45 DLR 1993 HD 171 at pp. 177-181 the condemned prisoner was in police custody for 2 days before making the confession; Qadir Bakhsh v. State PLD 1981 Karachi 581 at p. 585, confession was made after 24 hours have passed, following Tooh v. The State 1975 P Cr. L J 440 and Manzoor v. The State PLD 1973 Lah 714

[126] Wali Muhammad alias Nandhoo v. The State 1986 P Cr. L J 1153 at p. 1157 [Quetta]; Nazeer Hussain v. The State 1984 P Cr. L J 2683 at p. 2689 [Karachi], it was held that confession recorded with a delay of 7 days without satisfactory explanation cannot be considered voluntary.

[127] Muhammad Aslam v. The State 1981 P Cr. L J 308 at p. 319 [Karachi]

considered not fatal in recording a confession.[128] In Bangladesh, confession recorded after the person charged remained in police custody for three days[129] and fifteen days[130] were considered as true and voluntary. The legal formalities were followed by the magistrate in both these confessions. It was believed by the Court for the reason that the recovery evidence and other circumstantial evidence corroborated in minute detail.[131] It was observed in a few decisions in Pakistan that a confession is not necessarily involuntary for the reason that the accused remained in the police custody for a day or two.[132] In the absence of any torture[133] or when corroborated by circumstantial evidence[134] or where the accused is literate[135] the time lapse is immaterial and the confession could be considered as voluntary.[136] Fortunately, the trend seems not to accept the confession after the accused remained in police custody for more than twenty four hours.

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128 Kadir Bukhsh v. The State 1985 P Cr. L J 2375 at p. 2382 [Quetta] following Abdul Majeed v. The State PLD 1977 Kar 760, Tooh v. The State 1975 P Cr. L J 440 and Shaukat Saeed v. The State PLD 1978 Quetta 1

129 Hazrat Ali and Abdur Rahman v. The State 42 DLR 1990 HD 177 at pp.187-8

130 Abdur Rouf and others v. The State 38 DLR 1986 HD 188 at pp. 197-8

131 Hazrat Ali and Abdur Rahman v. The State 42 DLR 1990 HD 177 at pp. 187-8; Abdur Rouf and others v. The State 38 DLR 1986 HD 188 at p. 196-8

132 Mian Jan v. State PLD 1980 Peshawar 92 at p. 96

133 Sheri Zaman and 3 others v. The State 1989 P Cr. L J 1526 at pp. 1531-2 [Peshawar]

134 Sabz Ali v. The State 1985 P Cr. L J 437 at p. 444 [Peshawar] although it was regarded by the Court that confession recorded after 4 days of arrest amounted to gross negligence on the part of the Investigating Agency. In an earlier grave case, Sher Zaman alias Shero v. The State 1983 P Cr. L J 2519 at p. 2528 [Peshawar], a confession recorded after 4 days was considered voluntary and true when it was overwhelmingly corroborated by other evidence in all material particulars.

135 Akhtar Muhammad v. The State 1985 P Cr. L J 118 at p. 1123 [Quetta], confession was recorded 7 days after arrest.

136 Sheri Zaman and 3 others v. The State 1989 P Cr. L J 1526 at pp. 1531-2 [Peshawar]

3. Legal formalities should be observed properly.[137] In confession the magistrate must fill out the form with due care.[138] Failure to do so is a serious defect and not curable under section 537 of the Code of Criminal Procedure. [139] If the form is not available the magistrate must write down the confession on a plain piece of paper.[140] A confession recorded on plain paper due to non availability of printed form may be considered as a formal defect and is curable under section 533 of the Code of Criminal Procedure.[141] Section 533 of the Code of Criminal Procedure is the curable section but it would not cure a non-compliance of mandatory provisions if the error injures the accused in his defence on merit.[142] If the magistrate made a real endeavour to procure a voluntary confessional statement but did not record the questions or answers or certain part of it in the form or plain paper the confession will still be accepted although it is to be considered a formal defect.[143] Confession recorded without the magistrates following the mandatory provision is of no value.[144] The confessional statement recorded by a police officer on the dictation of a magistrate is a clear violation of the requirements of the

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137 Liaqat Bahadur v. State PLD 1987 FSC 43 at p. 50; Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65

138 Salauddin v. State 32 DLR 1980 HD 227 at pp. 237-8; Md. Azad Shaikh v. The State 41 DLR 1984 HD 62 at p. 65 following Nurul Hoque v. The State 20 DLR Dacca 780

139 Md. Azad Shaikh v. The State 41 DLR 1984 HD 62 at pp. 64-5

140 Abdul Hakim and others v. The State 43 DLR 1991 HD 389 at p. 391 following Jumma v. Crown PLD 1964 Lahore 783

141 The State v. Kalu Bepari BLD 1990 HCD 373 at pp. 379-80; Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65 relying on 20 DLR Dhaka 780; Abdul Hakim and others v. The State 43 DLR 1991 HD 389 at p. 390

142 Abdul Hakim and others v. The State BLD 1990 HCD 430 at p. 433

143 State v. Kalu Bepari 43 DLR 1991 HD 249 at p. 253; Umar Farin and others v. State PLD 1983 FSC 1 at p. 8

144 Leemon and another v. The State 1984 P Cr. L J 2690 at p. 2694 [Karachi]

mandatory provision of sections 164 and 364 of the Code of Criminal Procedure.[145]

4. Where there is more than one accused, the confession must be recorded separately.[146] Judicial confession made by each accused in the presence of the other accused is of no value.[147] Even confession made by an accused within the hearing of other accused is not considered free and voluntary.[148] Nobody should be present except the magistrate while recording a confession.[149]

5. A statement recorded not in the language of the maker but in the language of the magistrate does not amount to confession.[150] When a few clear words are inserted by the magistrate instead of many of the prisoner's own words it is admissible, as long as the other rules are followed.[151] If it appears that the magistrate recorded the confession in a different language than the maker then he should append a certificate that the content has been fully explained to the accused.[152]

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145 Mst Shamim Akhtar v. The State 1987 P Cr. L J 2484 at p. 2488 [Lahore]

146 Haji Khan and 2 others v. The State and others 1991 P Cr. L J 2110 at p. 2138 [FSC] following Mst Shamim Akhtar v. The State 1987 P Cr. L J 2484 at p. 2488 [Lahore]; Guloo v. State PLD 1988 Karachi 637 at p. 645; Shirmati Seetan v. The State 1988 P Cr. L J 939 at p. 945 [Karachi] following Dhani Bukhsh v. The State PLD 1975 SC 187; Allah Ditta and others v. The State PLD 1982 SC 267 at p. 270; Mumtaz Ahmad alias Taji v. The State PLD 1984 Lahore 48 at p. 55

147 The State v. Jameel Ahmad and another 1984 P Cr. L J 1011 at p. 1014 [Karachi]

148 Muhammad Shafiq and others v. The State 1984 P Cr. L J 2011 at p. 2017 [Karachi] following Dhani Bux v. The State PLD 1975 SC 87

149 Hafizuddin v. The State 42 DLR 1990 HD 397 at p. 402

150 The State v. Abdur Rashid Piada alias Abdur Rashid Sardar and others 40 DLR 1988 AD 106 at p. 109; Sardar v. State PLD 1980 Lahore 40 at p. 45 following Des Raj v. Emperor AIR 1928 Lah 858, Muhammad Alam v. The State PLD 1960 Lah 71, Nazir v. The State PLD 1960 Lah 189 and Iqbal Hussain v. The State PLD 1969 Lah 217; Nausher Ali Sarder & ors. v. The State 39 DLR 1987 AD 194 at p. 200

151 Nausher Ali Sarder & ors. v. The State 39 DLR 1987 AD 194 at p. 200

152 Nisar Ahmad v. The State 1989 P Cr. L J 1445 at p. 1448 [Karachi]

6. Confessional statements are divisible. The Court may believe a part of it and discard the other part.[153] The rule that a confession must either be accepted or rejected in its entirety applies only to those cases where there is no other evidence in the case, where other evidence is untrustworthy, and the only material for decision is the confession.[154] If eye witnesses are present, the Courts are at liberty to reject that part of the confession which is in conflict with the ocular testimony.[155] When a confessional statement of an accused is found voluntary, partly exculpatory and partly inculpatory, the exculpatory part, being improbable, contrary to reason and ordinary human conduct, and as such false, is liable to be rejected. The inculpatory part can be relied on even if the accused subsequently retracted.[156] A confession may be true and voluntary even when the accused has omitted or suppressed some of the facts.[157]

7. A voluntary confession must also be proved to be true. For establishing the truth it is necessary to examine the confession and compare it with the rest of the prosecution evidence and probabilities of the case.[158] Therefore a confessional statement

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153 Shahzada Khan v. The State 1983 P Cr. L J 1402 at p. 1405 [Lahore]

154 Wali Muhammad and others v. The State 1985 P Cr. L J 756 at p. 760 [Lahore]; Ghulam Nazir v. The State 1981 P Cr. L J 118 at pp. 127-8 [Karachi]; Mian Jan v. State PLD 1980 Peshawar 92 at p. 97; Allah Wasaya v. The State 1979 P Cr. L J 701 at p. 707 [Lahore]

155 Said Khan and another v. The State 1985 P Cr. L J 188 at p. 196 [Peshawar] following Khan Muhammad v. State PLD 1960 Lah 359, Mian Jan v. State PLD 1980 Pesh. 92, Shahzada Khan v. State 1983 P Cr. L J 1402 at p. 1404 [Peshawar] and Ghulam Nazir v. State 1981 P Cr. L J 118 at pp. 127-8 [Karachi]

156 Hazrat Ali and others v. The State 11 BLD 1991 AD 270 at p. 273; Abul Kashem and another v. The State BLD 1990 HCD 309 at pp. 325-6=42 DLR 1990 HD 378 at p. 385; State v. Masudur Rahman @ Tapan @ Rana BLD 1984 HCD 228 at p. 234

157 Shahjahan Manik and Farida Aktar Rina v. State 42 DLR 1990 HD 465 at pp. 467-8 and 470

158 Allah Dad v. The State 1982 P Cr. L J 1252 at p. 11257 [Karachi] following Nadir Hussain v. Crown 1969 SCMR 442 and Dhani Bukhsh v. The State PLD

should not run counter to the prosecution story[159] or to natural probabilities.[160]

The Court may decide a case on confession if the statement is corroborated.[161] This is done as a matter of precaution.[162] This does not mean that confession made to a police officer will be admissible if it is corroborated by the fact or recovery. As far as the fact or recovery is concerned it will be admissible in evidence under section 27 of the Evidence Act and presumably under article 40 of the Qanun-e-Shahadat but not the confession.[163] Any statement made to a police officer is inadmissible in evidence under section 162 of the Code of Criminal Procedure. Any confession made to a police officer is inadmissible under sections 25 and 26 of the Evidence Act and articles 38 and 39 of the Qanun-e-Shahadat. Section 27 of the Evidence Act and article 40 of the Qanun-e-Shahadat is an exception to these three sections. When any fact is deposed to as having been discovered in consequence of information received from an accused during police custody, so much of such information, whether it amounts to confession or not, and as it relates distinctly to the fact thereby discovered, is admissible.[164] Any statement if made before

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1975 SC 187; The State v. Md. Kibria @ Shahjahan 43 DLR 1991 HD 512 at p. 515

159 Mizanul Islam v. State 41 DLR 1989 AD 157 at p. 161; Nisar Ahmad v. The State 1989 P Cr. L J 1445 at p. 1448 [Karachi]; Farooq Khan v. The State 1989 P Cr. L J 1520 at p. 1525 [Peshawar]

160 Ghulam Abuzar and another v. The State 1991 P Cr. L J 697 at p. 704 [Karachi], following State v. Asfand Yar Wali and 2 others 1982 SCMR 321; Ali Muhammad v. The State 1985 P Cr. L J 1216 at p. 1219 [Lahore]

161 Farid Khan v. The State 45 DLR 1993 HD 171 at pp. 177-181

162 State v. Shafique and others v. State 43 DLR 1991 AD 203 at p. 208; Abdul Baqi v. The State 1990 P Cr. L J 145 at p. 152 [Peshawar]

163 Dipok Kumar Sarkar v. The State BLD 1988 AD 109 at p. 112; Khasru @ Khorshed v. The State BLD 1983 HCD 318 at p. 324

164 Mohammad Siddiqur Rahman & ors. v. The State BLD 1987 AD 33 at pp. 96-7; Bashar Ali and others v. The State 12 BLD 1992 HCD 225 at p. 227; Bachchu v. State 35 DLR 1983 HD 170 at p. 174

the arrival of a police officer will not be affected as it was not made in the presence of or while in the custody of the police officer.[165]

8. After confession the accused must not be sent to police custody but to the judicial lock up.[166] The voluntary nature of the confession is vitiated if the condemned prisoner is sent back to the police custody.[167] In legal parlance, custody does not necessarily mean custody after formal arrest but includes a state of affairs in which accused can be said to have come into the hands of a police officer or have been under some form of police surveillance or restriction on his movements by the police. Such form of custody can be termed as illegal custody.[168] If the magistrate fails to assure that the accused would not be handed over to the police custody whether they made confessions or not the confession is not considered voluntary[169] Moreover if then they were sent back to a judicial lock up which was for all intents and purposes a police lock up, the confession cannot be considered as voluntary.[170] It was decided in a case from Pakistan that independent corroboration would be needed to convict the accused if he were returned to police custody.[171] In other words this case is suggesting that sending an accused to police custody would not have serious repercussions. This case seems to be not in accordance with the general rule developing in Pakistan.

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[165] Nausher Ali Sarder and ors. v. The State BLD 1987 AD 324 at p. 327

[166] Umar Farin and others v. State PLD 1983 FSC 1 at p. 3; Muhammad Naseer v. The State PLD 1988 FSC 58 at p. 75; Muhammad Hussain v. The State 1987 P Cr. L J 547 at p. 550 [FSC], if the accused is remanded back to the police the confession would be considered involuntary.

[167] The State v. Md. Kibria @ Shahjahan 43 DLR 1991 HD 512 at pp. 514-5

[168] Farooq Khan v. The State 1989 P Cr. L J 1520 at p. 1525 [Peshawar]; Ghulam Rasul v. The State 1982 P Cr. L J 720 at p. 723

[169] Abdullah v. The State 1983 P Cr. L J 1594 at p. 1599 [Karachi]; Ghulam Rasul v. The State 1982 P Cr. L J 720 at p. 723 [Lahore]

[170] Ghulam Rasul v. The State 1982 P Cr. L J 720 at p. 723 [Lahore]; Allah Bachayo v. The State 1984 P Cr. L J 2727 at p. 2735 [Karachi]

[171] Pandhi and another v. The State 1984 P Cr. L J 1792 at p. 1796 [Karachi]

9. A magistrate recording the confessions of persons of tender age has to be very careful and cautious to exclude even the slightest possibility of extracting confessions from them by threat or undue influence or coercion on account of their tender age as persons of tender age are easily susceptible to suggestions compared to a grown up person. It may be mentioned that no special procedure under the Code of Criminal Procedure is provided to record confessions of persons of tender age. The police in such cases should produce young offenders before a magistrate of first class than that of a magistrate of second class.[172] In Islamic law the confession of a young offender who has not reached puberty will be of no value.[173] Confessional statement as against the maker is supposed to be the best evidence.[174] If the confession is found to be true and voluntary the Court can impose the sentence of death.[175] For that reason confession in the Courts of Pakistan and Bangladesh is accepted with great caution as far as legal formalities are concerned. But some of the decisions are alarming, e.g. confession on a plain piece of paper may be curable under section 533 of the Code of Criminal Procedure. Or where the magistrate did not record the question or answers or some part of it on the form or a plain piece of paper but made a real endeavour to procure a confession. This goes without saying that

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[172] Amanatullah and another v. The State 1986 P Cr. L J 523 at p. 535 [Quetta], this case seems to recognise accused of ten, eleven or twelve as children of tender age for the purpose of confession as opposed to victims of the same age discussed in chapter 3.1.3.1 also see Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi] and The State v. Jameel Ahmad 1984 P Cr. L J 1011 at p. 1014 [Karachi]

[173] Salama, 'General Principles.... 1982 at pp. 116-9

[174] State v. Manik Bala 41 DLR 1989 HD 435 at p. 440

[175] The State v. Punadhar Joydhar and Kudu and Shepali 31 DLR 1979 HD 312 at p. 319, it was further stated in this case that the Court can impose death sentence on an uncorroborated confession if it is found to be true and voluntary. This is a misstatement because this case was very well proved by circumstantial evidence. The confession was also recorded within twenty four hours.

this might jeopardise the right of an accused, because confession to a magistrate is hearsay evidence. How can a magistrate be judged as to his endeavour. What activities on the part of the magistrate would prove his 'real endeavour' where he did not bother to record the required set of questions. Those questions are a kind of a check on the authority of the magistrate. How one is to ensure the objectivity of the magistrate?

For a confession to be effective in respect of the Hudud Ordinances it must be recorded only by a Sessions Court; the jurisdiction of a magistrate has been expressly excluded.[176] Any statement before a magistrate therefore is not a confession and therefore has no legal effect. A magistrate is sufficient to record a confession in all other cases. In Islamic law, especially Hanafi School of thought, a confession must be judicial. The confession made in the office of a sessions judge according to the Hudud laws would be hearsay evidence in the common law sense and not direct evidence as required by Islamic law. Even in Islamic law, for accepting hearsay evidence it must be in front of two witnesses. How could a confession in front of a single judge whether direct or hearsay, in Hudud cases which could lead to the death of the person no matter how honest he may be, be admissible in evidence?

Janoo v. The State[177] is a case of Zina bil jabr that was proven by four eye witnesses and also by the confession of the accused. On 16-3-1980 a girl aged about ten years was alone in the house along with her one and half years old sister. She was taken by force by one Janoo to the jungle where he removed her ornaments and then

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176 Mumtaz Khan v. The State 1992 P Cr. L J 412 at p. 414 [Peshawar]; Muhammad Naseer v. The State PLD 1988 FSC 58 at pp. 74-5

177 Janoo alias Jan Muhammad v. The State PLD 1982 FSC 87

committed sexual intercourse with her. Her cries attracted her uncle the complainant, her father, another uncle and her cousin. The appellant was arrested from his house on 1-4-1980 and the girls ornaments were recovered; these were identified by the witnesses on 2-4-1980. On the day he was arrested the appellant confessed his guilt on both the counts before the magistrate.

The Court observed that there is no reason to cast doubt on the voluntary nature of the confession which was recorded within few hours of the arrest and after the learned magistrate had satisfied himself by all possible precautions and warnings about its voluntary nature. He had enquired from him if he was maltreated by the police, to which the appellant replied in the negative. There are some minor discrepancies but the confession as a whole could not be condemned on that account, particularly when part of the confession relating to the actual offence is corroborated by reliable evidence of the eye witnesses. Even if the confession is ignored, for which there is no reason, there was sufficient evidence for the conviction of the appellant on both the charges.

The Court both believed the voluntary nature of the confession and also had the required four eye witnesses to prove Zina bil jabr for the punishment of Hadd. The reason for not inflicting the Hadd punishment is given by the Federal Shariat Court as being not made an issue in the Higher Court and because it was witnessed by near relatives. Islamic law bars a relative to be a witness generally. It is strictly followed to inflict capital punishments of Hadd and Qisas.[178] The case law of Muhammad Naseer v. The State[179] that interpreted

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[178] see chapters 2.1.2, 3.1.1 and 4.1.1.1; Muhammad Farooq Khan v. The State 1983 P Cr. L J 987 at p. 990[Azad J&K]

[179] Muhammad Naseer v. The State PLD 1988 FSC 58 at pp. 74-5 also see Mumtaz Khan v. The State 1992 P Cr. L J 412 at p. 414 [Peshawar]

the amendments made in 1980 in the Hudud laws mentioned above is a later judgement by the Federal Shariat Court. The case law has interpreted that a confession in Hadd offences must be made in front of a sessions judge and not a magistrate despite the fact that the amendments only mention that offences punishable with Hadd is triable before a sessions judge. In future cases the Court would be free to take the plea in similar cases that if the confession is not before a sessions judge, it cannot be accepted. In certain grave cases the Court should not be lenient with the confessing accused. If the confessing accused is dealt with leniently, as in contempt of Court cases where Court and the contempter is involved, without infringing the right of an individual, a new door will be opened in a proved case for the accused to make confessions.[180]

5.2.2.1 Extra Judicial Confession

All the three schools except the Hanafi School accept extra judicial confession in front of two witnesses. The Federal Shariat Court in Pakistan applying Islamic law is of the view that an extra judicial confession is not to be taken as confession, but just a statement of the witness that he heard the accused saying that he had committed the offence. Such evidence must be corroborated by other evidence and circumstances of the case if it is to be considered in imposing Tazir punishment.[181]

In Pakistan and Bangladesh, it appears from the case law that the extra judicial confession is in almost all cases made in front of two witnesses.[182] In one case where the extra judicial confession was

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[180] Shafique Ahmad v. The State 1984 P Cr. L J 1617 at p. 1620 [Karachi]

[181] Muhammad Naseer v. The State PLD 1988 FSC 58 at p. 74

[182] Ghulam Mustafa alias Ziau v. The State PLD 1991 SC 718 at p. 722, Rehman Gul v. The State PLD 1988 SC 147 at p. 149; Mumtaz Ahmad v. State PLD 1984

made in front of only one witness it was corroborated by recovery evidence.[183] There seems a general kind of awareness among the people that confession must be in front of two witnesses. Extra judicial confession made to a witness in the presence of police would be hit by section 25 of the Evidence Act and article 38 of the Qanun-e-Shahadat as inadmissible.[184] An extra judicial confession extracted by inducement contemplated under section 24 of the Evidence Act and article 37 of the Qanun-e-Shahadat is inadmissible.[185] An extra judicial confession actuated by a promise is not admissible in evidence according to section 28 of the Evidence Act and article 41 of the Qanun-e-Shahadat.[186]

The guiding principles for general law laid down by the superior Courts of Pakistan and Bangladesh for the appreciation of the extra judicial confession and the circumstantial evidence are :

extra judicial confession is at best a weak type of evidence[187] and utmost care and caution is to be used in placing reliance on such confession,[188] which also requires a three-fold proof; firstly, that,

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Lahore 48 at p. 55; Nausher Ali Sarder and ors. v. The State 39 DLR 1987 AD 194 at p. 199; The State v. Lutfor Fakir 24 DLR 1972 (DAC) 217 at p. 221

183 Allah Ditta and others v. The State PLD 1982 SC 267 at pp. 270-1

184 Ghulam Rasool v. The State 1984 P Cr. L J 132 at p. 135 [Karachi]

185 Mst Saeedah v. The State 1987 P Cr. L J 676 at p. 679 [Lahore]

186 Basara and 2 others v. The State 1990 P Cr. L J 311 at p. 315 [Lahore]

187 Mukhtar Ahmad and others v. The State 1992 P Cr. L J 1396 at p. 1400 [Lahore]; Shirmati Seetan v. The State 1988 P Cr. L J 939 at p. 949 [Karachi]; Akhlaq Ahmad and others v. The State 1988 P Cr. L J 1655 at p.1659 [Lahore], because it can easily be concocted or procured; Jan Muhammad v. The State 1986 P Cr. L J 17 at p. 19 [Karachi]; Muhammad Siddique and others v. The State 1986 P Cr. L J 2857 at p. 2864 [Lahore] Karam Bhari v. Muhammad Saeed and others 1985 P Cr. L J 731 at p. 735 [Lahore]; Zafar Abbas and another v. The State 1984 P Cr. L J 951 at p. 955 [Lahore]

188 Mehmood v. The State 1993 P Cr. L J 402 at p. 405 [Karachi] Haji Ahmad v. The State 1979 P Cr. L J 460 at p. 465 [Lahore] following Ghulam Qadir v. The State PLD 1960 SC 254; Muhammad Akram alias Dr. Ikram and another v. The State 1982 P Cr. L J 592 at p. 594 [Lahore]

in fact, it was made, secondly, that it was voluntarily made, and thirdly, that it was truly made.[189]

The circumstantial evidence should exclude all hypothesis of innocence, and should lead to one and only one conclusion: that the accused and none else has committed the crime.[190] It requires independent corroboration.[191] It should not run counter to natural probabilities.[192] The value of such confession as evidence depends on the veracity of witnesses to whom it is made.[193] An extra judicial confession in front of a person who wields influence as would intimidate or make an inducement or promise is irrelevant.[194] An extra judicial confession made to interested and closely related witnesses[195] or in front of a witness whose testimony suffers from inherent improbabilities[196] cannot be relied on. The extra judicial confession, like the judicial confession, should be made separately, if there are more than one accused.[197] In other words, a joint extra judicial confession is of no value.[198] An extra judicial confession

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189 Mst Saeedah v. The State 1987 P Cr. L J 676 at p. 679 [Lahore]

190 Ali Muhammad v. The State 1985 P Cr. L J 1216 at p. 1218 [Lahore]; Badar Din v. State PLD 1983 Lahore 122 at p. 124; Sardar v. State PLD 1982 Lahore 40 at p. 45; Nausher Ali Sarder and others v. The State 39 DLR 1987 AD 194 at p. 200

191 Mst Saeedah v. The State 1987 P Cr. L J 676 at p. 679 [Lahore]; Muhammad Bashir v. The State 1985 P Cr. L J 391 at p. 402 [Azad J&K] Shaukat Masih v. The State 1984 P Cr. L J 2511 at p. 2512 [Lahore] ; Allah Dino alias Dino and 3 others v. The State 1984 P Cr. L J 2242 at p. 2246

192 Ali Ahmad v. The State 1985 P Cr. L J 2546 at p. 2550 [Lahore]

193 State and ors. v. Badsha Molla BLD 1989 HCD 257 at p. 264

194 Allah Ditta and others v. The State PLD 1982 SC 267 at p. 270; Ali Ahmed v. The State 1979 P Cr. L J 294 at p. 299 [Baghdadul Jadid]

195 Muhammad Aslam alias Asloo and others v. The State 1983 P Cr. L J 844 at p. 851 [Lahore]

196 Abdullah v. The State 1985 P Cr. L J 1938 at p. 1945 [Karachi]

197 Mumtaz Ahmad v. State PLD 1984 Lahore 48 at p. 55; Muhammad Amin and another v. The State 1984 P Cr. L J 925 at p. 926 [Lahore]

198 Haji Ahmad v. The State 1979 P Cr. L J 460 at p. 465 [Lahore] following Manzoor and others v. State PLD 1957 Lahore 1023 and Mir and another v. State 1971 P Cr. L J 1214

cannot be relied upon without corroboration by other authentic evidence.[199]

The Supreme Court of Pakistan in Ghulam Mustafa v. The State[200] found that the High Court had rightly rejected the evidence regarding extra judicial confession in a case of rape and subsequent murder by strangulation of a girl of seven/eight years, where the two witnesses to the said extra judicial confession did not utter a word about it for thirteen days.

The Supreme Court of Pakistan believed in an extra judicial confession in the case of Rehman Gul v. The State.[201] The accused was apprehended almost red handed and was found concealing a child under jacket. He was armed with a chura (knife) and admitted in his extra judicial confession that he had committed the act for purpose of selling the child of around two years of age. The extra judicial confession was made in front of the complainant, who was the father of the victim, and two other admittedly independent and disinterested eye witnesses.

An extra judicial confession cannot corroborate a retracted judicial confession or a judicial confession where the two versions of the confession are different in all material particulars.[202] There is a nexus between an extra judicial confession and a judicial confession in the same case. If either is to be disbelieved, it will adversely affect the other, rendering it unreliable in the absence of some other

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199 Mobarak Hossain @ Md. Mobarak Hossain v. The State BLD 1983 AD 329 at p. 333; State v. Mst Mukhtaran and another 1980 P Cr. L J 827 at p. 830 [Lahore] following Ghulam Mohammad v. State PLD 1971 Lah. 850 and Rahzan v. State PLD 1960 Lah. 24

200 Ghulam Mustafa alias Ziau v. The State PLD 1991 SC 718 at pp. 720-22

201 Rehman Gul v. The State PLD 1988 SC 147 at p. 149

202 Kadir Bux v. The State 1981 P Cr. L J 793 at p. 803 [Karachi]

independent corroborative piece of evidence from an unimpeachable source.[203]

If two extra judicial confessions of two accused conflict with each other, it has to be excluded. The law is very sensitive in receiving extra judicial confession. An extra judicial confession made at first instance may be relied upon.[204]

5.2.2.2 Confession of Co-accused

The Federal Shariat Court has discussed in detail the position of a co-accused in relation to confession in the case of Arif Nawaz Khan v. State.[205] In Islamic criminal law, the confession of an accused against the co-accused is not acceptable, and if there is no other proof against him, he will not be punished on the said confession.

A confession only implicates the accused, but not the co-accused. This is also based on the concept of individual responsibility. However it may be considered as Qarinah, as circumstantial piece of evidence against the co-accused and can be a basis for Tazir to the co-accused if it is corroborated by other independent evidence.

The Council of Islamic Ideology in its 9th report on the Islamisation of the Code of Criminal Procedure, 1898 also observed that when an accused confesses a crime, he becomes Fasiq, bearing a bad character, and does not remain 'Adil, credible, and as such his evidence is not acceptable against the co-accused. His confession is only restricted to his own self and cannot be extended to anyone else. However, his confession can be utilised for further investigation in

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[203] Allah Bachayo v. The State 1984 P Cr. L J 2727 at p. 2735 [Karachi]

[204] Muhammad Aslam alias Asloo and others v. The State 1983 P Cr. L J 844 at p. 851 [Lahore]

[205] Arif Nawaz Khan v. State PLD 1991 FSC 53 at pp. 62-4

the matter and if the offence of his co-accused is proved by corroboration, he will be punished by Tazir accordingly.

The same rule applies to the evidence of an accomplice against his co-accused under article 16 of the Qanun-e-Shahadat.[206] It is inadmissible for Hadd punishment. It should therefore follow that accomplice testimony should be inadmissible for awarding Qisas as well. In Tazir offences although evidence of an accomplice is admissible, conviction cannot be based solely on the uncorroborated testimony of such accomplice.[207]

A confessional statement made by an accused may be used against other co- accused as circumstantial evidence, i.e. it can be taken into consideration as a corroborative piece of evidence, if there is other direct independent evidence connecting the co-accused with the commission of offence. But it is settled law that the confessional statement "alone" cannot form the "sole basis" for the conviction of the other co-accused, and more so when the alleged confession is tainted with doubt as to its voluntary nature, and, above all, retracted subsequently.[208]

The Law prior to the passing of Evidence Act in India was that the confession of an accused person was only evidence against himself and could not be used against others in the absence of direct evidence corroborating the same. Under section 30 of the Evidence Act confession of co-accused was to be taken into consideration

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[206] corresponding section is 133 of the Evidence Act. There is no distinction of Hadd offence in s. 133 of the Evidence Act as in art. 16 of Qanun-e-Shahadat.

[207] Asif Ali Zardari v. The State 1992 P Cr. L J 171 at p. 177 [Karachi] following Haider Hussain v. Govt. of Pakistan PLD 1991 FSC 139 (regarding art. 16 of Qanun-e-Shahadat) and Federation of Pakistan v. Gul Hussan Khan PLD 1989 SC 633 (striking down sections 337 to 339A Cr. P. C in Pakistan); Tazir offences are equivalent to the general criminal offences and section 133 of the Evidence Act is the corresponding section of article 16 of the Qanun-e-Shahadat.

[208] Arif Nawaz Khan and 3 others v. State PLD 1991 FSC 53 at pp. 62-4

against him and also against such other persons against whom the said confession was made.[209] After the promulgation of Qanun-e-Shahadat, as per article 43, confession is a proof against the person making it and it has to be taken into consideration as circumstantial evidence against persons who are being tried jointly for the same offence.[210] It seems that the law in use before 1872 endured even after the introduction of section 30 of the Evidence Act in 1872 in the Indian subcontinent, as the Courts always made a strict use of this section.[211] After the introduction of Qanun-e-Shahadat, as section 30 stands now in the form of article 43, it seems that the past law in practice received legal sanction in Pakistan. The law with respect to confession of a co-accused remains the same both in Pakistan and Bangladesh even today.[212]

The confession of a co-accused, even when admissible, is not evidence within the meaning of section 3 of the Evidence Act[213] and can only be taken into consideration to lend assurance to other evidence on record.[214] The reason is, it is not made on oath and its

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209 Babor Ali Molla v. The State 44 DLR 1992 AD 10 at p. 13

210 Pir Mazhar-ul-Haq v. The State 1992 P Cr. L J 1910 at p. 1912 [Karachi]

211 Lutfun Nahar v. State 27 DLR 1975 AD 29 at p. 32; Minority view of Justice M.H. Rahman in The State v. Lalu Miah 39 DLR 1987 AD 117 at p. 148 following Bhuboni Sahu v. The King AIR 1949 PC 257 at p. 259, Maqbul Hussain v. The State 12 DLR SC 217, Lutfun Nahar v. State 27 DLR AD 29, State v. Fuzu Kazi 29 DLR SC 271 and Joygun Bibi v. The State 12 DLR SC 156; Amir Hossain Howlader v. The State 37 DLR 1985 AD 139 at pp. 142-4 following Bhuboni Sahu vs. The King, 76 Indian Appeals, 147, The Privy Council and Joygun Bibi v. The State PLD 1960 SC 313, 12 DLR SC 156

212 Babor Ali Molla v. State 44 DLR 1992 AD 10 at p. 13; The State v. Lalu Miah 39 DLR 1987 AD 117 at p. 148; Shabiul Hassan v. The State PLD 1991 SC 898 at pp. 900-1

213 State v. Nurul Hoque 45 DLR 1993 HD 306 at p. 318; Ghulam Abuzar and another v. The State 1991 P Cr. L J 697 at p. 704 [Karachi] specially if the rest of the evidence is unsatisfactory.

214 The State v. Abul Khair and others 12 BLD 1992 HCD 262 at p. 266=44 DLR 1992 HD 284 at p. 287; Babor Ali Molla and others v. The State 11 BLD 1991 AD 256 at p. 259; Mahmud Ali and others v. The State BLD 1985 HCD 218 at pp. 220-2; Azhar Ali Shah v. The State 1984 P Cr. L J 3220 at pp. 3221-2

veracity is not tested by cross examination.[215] It cannot form the basis of the conviction of the co-accused[216] unless corroborated in material particulars by independent evidence on record.[217] Corroboration is a rule of prudence laid down as practice by the Courts.[218] The Court may at its option take into consideration the inculpatory confessional statement against the co-accused under section 30 of the Evidence Act.[219] Extra judicial confession of co-accused is still weaker than the extra judicial confession itself.[220] There is only one case law, Muhammad Haleem Cohan v. The State[221] which decided that a confession, whether judicial or extra judicial, if believed, is sufficient to base a conviction not only of the confessing accused but also the co-accused implicated by him. This decision seems to be very sweeping and does not tally with other Court decisions. The true position perhaps would be to accept such confessions in such circumstances where all other evidence corroborates the guilt of the accuseds without any doubt.

[Karachi]; Safar Ali and others v. The State BLD 1983 HCD 325 at p. 327; Mobarak Hossain v. State BLD 1981 HCD 286 at p. 297

215 Amir Hossain Hawlader v. The State BLD 1984 AD 193 at p. 196

216 Shabiul Hassan v. The State PLD 1991 SC 898 at p. 901; Abdul Malik v. State 36 DLR 1984 HD 275 at p. 283

217 Mumtaz Ali Shaikh and another v. The State 1993 P Cr. L J 1919 at p. 1921 [Karachi]; Hannan @ A. Hannan v. The State 12 BLD 1992 HCD 147 at p. 149; The State v. Lalu Miah and another BLD 1987 AD 212 at p. 219 (majority view); Ali Asghar and another v. The State 1986 BLD 436 at p. 440; Abdur Rashid v. The State 1982 P Cr. L J 601 at p. 603 [Lahore]

218 Sheikh Ahmed v. The State 1979 BSCR 417 at p. 426

219 Muhammad Hussain and others v. The State 1985 P Cr. L J 1506 at p. 1510 [Lahore]

220 Muhammad Akram alias Dr. Ikram and another v. The State 1982 P Cr. L J 592 at p. 594 [Lahore]

221 Muhammad Haleem Cohan v. The State 1980 P Cr. L J 128 [Lahore] at p. 135

5.2.2.3 Retraction of Confession

The Federal Shariat Court in Pakistan has discussed the retraction of confession in the case of Arif Nawaz Khan v. State.[222] In Islamic law as far as retraction from confession is concerned, it has two aspects. If an admission is made in respect of an individual's right it cannot be retracted by the maker of admission against himself on the principle---the man is caught by his admission (acknowledgement): and if it is made in respect of a crime involving public right it can be retracted. It has, therefore, been laid down in the Islamic law of Hudud that the execution of the Hadd punishment shall be suspended when a person retracted before or during the enforcement of Hadd, because his retraction shall also be a sort of information which carries with it the probability of truth, like confession, and nothing will be there to disprove or falsify this information. So doubt is created by retraction after confession. Therefore, according to the Hadith of the Holy Prophet the Hudud punishment shall be replaced by doubts. This principle is not applicable to Diyat and Qazf punishment, as in both these cases the rights of men are mainly involved. By admission, acknowledgement or confession, the right of one man is admitted by the other, against himself (the maker), which shall not become nugatory by retraction, whereas a confession not involving an individual's right may be retracted. In the circumstance when a person retracts from his confession, his retraction shall be accepted and he shall be absolved from Hadd punishment, unless the Hadd punishment is proved by evidence of testimony. It is also mentioned in this case, following the general trend of case law, that reliance cannot be placed on the

uncorroborated and retracted confession.[222] It would follow from this rule that even for Diyat and Qazf cases, uncorroborated retracted confession should not be relied upon. If it is retracted before the execution of the Hadd sentence, the sentence shall not be executed. If the retraction comes at any time during the enforcement of Hadd, the unexecuted part of the sentence shall be stayed.[223]

Within the ambit of general law of Pakistan and Bangladesh, retraction of a confession does not cancel the confession if it is found that it was voluntary and true.[224] A confession is also admissible in evidence even if it is false but voluntary[225] as it is possible that a confession may be voluntary but not true.[226] A retracted confession, judicial or extra judicial,[227] like the one which is not retracted, may form the sole basis of conviction of its maker[228] if the confession is considered to be voluntary and true[229]

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222 Arif Nawaz Khan v. State PLD 1991 FSC 53 at p. 64; Wali Muhammad alias Nandhoo v. The State 1986 P Cr. L J 1153 at p. 1157 [Quetta] following State v. Minhun alias Gul Hassan PLD 1964 SC 813 and Nadir Hussain v. The Crown 1969 SCMR 442

223 Muhammad Naseer v. State PLD 1988 FSC 58 at p. 73; Arif Nawaz Khan v. State PLD 1991 FSC 53 at p. 64

224 Ghulam Muhammad v. State PLD 1982 Lahore 428 at p. 435 following Nadir Hussain v. The Crown 1969 SCMR 442 and Dhani Baksh v. The State PLD 1975 SC 187; Abdul Baqi v. State PLD 1986 Quetta 193 at p.198 following The State v. Minhun alias Gul Hassan PLD 1964 SC 813, Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi], Sharafat Hussain v. The State 1984 P. Cr. L. J. 1730 at p. 1740 [Karachi] and Nazeer Hussain v. The State 1984 P. Cr. L. J. 2683 at p. 2689 [Karachi]; Guloo v. State PLD 1988 Karachi 637 at p. 644 following Nadir Hussain v. The Crown 1969 SCMR 442; Amir Hossain Howlader and ors. v. The State 37 DLR 1985 AD 139 at pp. 142-4

225 Khanzada Mir v. State PLD 1979 Peshawar 215 at pp. 219-20

226 Ali Haider v. The State 1981 P Cr. L J 97 at p. 99 [Lahore]

227 Abdur Rashid and others v. The State BLD 1983 HCD 206 at p. 210

228 Amir Hossain Howlader and others v. The State 37 DLR 1985 AD 139 at pp. 142-4

229 Ali Asghar and another v. The State BLD 1986 HCD 436 at p. 438; Abdul Malik and others v. The State BLD 1985 HCD 67 at pp. 72-4; Muhammad Arif v. The State 1983 P Cr. L J 1275 at p. 1278 [Karachi]; The State v. Abu Bakkar and others BLD 1983 HCD 240 at p. 246; State v. Abdur Rashid and 2 others 35 DLR 1983 HD 195 at p. 199

after being materially corroborated.[230] The judicial history attests copious deliberation against the danger of placing reliance on uncorroborated and retracted confession.[231] But in a Bangladesh Supreme Court decision, The State v. Fazu Kazi alias Fazlur Rahman and others it was decided that a conviction of the confessing accused based on a retracted confession, even if uncorroborated, is not illegal if the Court believes that it is voluntary and true.[232] This decision seems to lay down an incorrect interpretation of law.

To rely on retracted confession the Court ought to take into consideration

i. the lapse of time before confession was retracted,

ii. the reason given by the confessor for making and retracting confession and

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230 Abdur Rahman Syed v. State 44 DLR 1992 HD 556 at pp. 569-73; The State v. Nayar Mirza and others 1989 P Cr. L J 1005 at p. 1009 [Karachi] following State of Uttar Pradesh v. Boota Sing and others AIR 1978 SC 1770 (1775); Muhammad Malook Mangsi v. The State 1986 P Cr. L J 2764 at p. 2771 [Karachi]; Muhammad Ismail v. The State 1985 P Cr. L J 713 at p. 718 [Karachi] following Majnoo v. The State 1981 P Cr. L J 463 at p. 468 [Karachi] and Noor Nabi Agha v. The State PLD 1972 Kar 292; Muhammad Bashir v. The State 1985 P Cr. L J 391 at p. 402 [Azad J&K]; Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi]; Sharafat Hussain v. The State 1984 P Cr. L J 1730 at p. 1740 [Karachi] following State v. Minhun PLD 1964 SC 813, Nadir Hussain v. The Crown 1969 SCMR 442, Dhani Bakhsh v. The State PLD 1975 SC 187 and Naqibullah v. The State PLD 1975 SC 21; Sheedu v. The State 1984 P Cr. L J 864 at p. 867 [Karachi]; Shahzada Khan v. The State 1983 P Cr. L J 1402 at p. 1404 [Peshawar]; Anwar Ali alias Ghulam Anwar v. The State 1982 P Cr. L J 1213 at p. 1215 [Karachi]; Zafar Ali v. The State 1982 P Cr. L J 1209 at p. 1212 [Lahore]; Ghulam Muhammad v. State PLD 1982 Lahore 428 at p. 435=1982 P Cr. L J 1217 at p. 1224 [Lahore] following Nadir Hussain v. The Crown 1969 SCMR 442, Dhani Baksh v. The State PLD 1975 SC 187; Abdul Baqi v. State PLD 1986 Quetta 193 at p. 198 following The State v. Minhun alias Gul Hassan PLD 1964 SC 813, Abdul Haleem v. The State 1984 P Cr. L J 611 at p. 619 [Karachi], Sharafat Hussain v. The State 1984 P Cr. L J 1730 at p. 1740 [Karachi] and Nazeer Hussain v. The State 1984 P Cr. L J 2683 at p. 2689 [Karachi]; Guloo v. State PLD 1988 Karachi 637 at p. 644 following State v. Minhun alias Gul Hassan PLD 1964 SC 813

231 Liaqat Bahadur v. State PLD 1987 FSC 43 at p. 49; Khawaja Muhammad Anwar v. The State 1983 P Cr. L J 2070 at p. 2074 [Karachi]

232 The State v. Fazu Kazi alias Fazlur Rahman and others 1978 BSCR 413 at p. 419

iii. the nature and *quantum* of proof that was available against the confessor before he confessed.[233]

A retracted judicial confession cannot be corroborated by retracted extra judicial confession because one tainted piece of evidence cannot corroborate other piece of tainted evidence.[234]

As against a co-accused, the evidentiary value of a retracted confession is practically nil and in absence of strong independent evidence it is totally useless,[235] even where the confession is true and voluntary,[236] more so if the maker entirely exonerates himself or throws the blame entirely on others.[237] An accused cannot be convicted on retracted confession unless the same is corroborated by independent evidence.[238] A retraction of confession at an earlier opportunity has more weight towards the confession being involuntary than a belated one.[239] A belated retraction at the end of the trial would be of no value.[240]

This stand has been taken by the Federal Shariat Court of Pakistan, accepting that an accused could be convicted on retracted confession

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233 Akhtar Muhammad v. The State 1985 P Cr. L J 1118 at p. 1124 [Quetta]

234 Nazeer Hussain v. The State 1984 P Cr. L J 2683 at p. 2689 [Karachi] following State v. Minhun PLD 1964 SC 813

235 Muhammad Hussain v. The State 1987 P Cr. L J 547 at p. 550 [FSC]; Amir Hossain Howlader & ors. v. The State 37 DLR 1985 AD 139 at pp. 142-4; Ali Asghar and another v. The State 1986 BLD 436 at p. 440; Abdul Baqi v. State PLD 1986 Quetta 193 at p. 197; The State v. Fazu Kazi alias Fazlur Rahman and others 1978 BSCR 413 at p. 419

236 The State v. Nayar Mirza and others 1989 P Cr. L J 1005 at p. 1009 [Karachi] following Qalandar Bux v. The State PLD 1964 (W.P.) Kar 269

237 Liaqat Bahadur v. State PLD 1987 FSC 43 at p. 49; Ibrahim Mollah and others v. The State BLD 1987 AD 248 at p. 255

238 Muhammad Amin v. The State PLD 1990 SC 484 (Sh. App. B.) at pp. 488-490 and 496; The State v. Nayar Mirza and others 1989 P Cr. L J 1005 at p. 1009 [Karachi] following Ramzan v. The State PLD 1966 (W.P.) Kar 242

239 The State v. Md. Kibria @ Shahjahan 43 DLR 1991 HD 512 at p. 515; Hazrat Ali and Abdur Rahman v. The State 42 DLR 1990 HD 177 at p. 187; Shirmati Seetan v. The State 1988 P Cr. L J 939 at p. 946 [Karachi] following Bano v. The State 1972 P Cr. L J 775

240 State v. Nurul Hoque 45 DLR 1993 HD 306 at p. 315

if found voluntary and true. But in such case only Tazir punishment could be awarded and not Hadd punishment.[241]

5.2.2.4 Evidentiary Value of Confession

Confession is considered of importance in Pakistan and Bangladesh because it is generally believed that a person would not admit against his own interest.[242] One Pakistani decision gives the reason for confession as after committing a heinous crime a person suffers psychological disturbance, and if he succumbs to it immediately he confesses and if he resists it for a while then he does not. [243] This is generally followed in Pakistan, as a confession, more than twenty four hours after remaining in police custody, is usually not accepted. In Bangladesh in the case of The State v. Mizanul Islam the Court observed that it is common knowledge that no rational being can be expected to make false admission detrimental to his own interest and safety.[244] The trend in accepting confession in the Courts of Bangladesh so far had been not to bother with the time lapse between the time of arrest and confession.

In the west much research has been done to weigh the probative value of confession made to a police officer. A confession made to a police officer in Pakistan and Bangladesh is not admissible in evidence in all cases. In Pakistan and Bangladesh confession has to be made only in front of a magistrate except in a Hadd case it must be in front of a sessions judge in Pakistan. No research weighing the probative value of confession made in front of a magistrate seems to

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241 Umar Farin and others v. The State PLD 1983 FSC 1

242 Muhammad Naseer v. The State PLD 1988 FSC 53 at pp. 74-5; Md. Azad Shaikh v. The State 41 DLR 1989 HD 62 at p. 65

243 Sher Muhammad v. State PLD 1984 Lahore 155 at p. 161

244 The State v. Mizanul Islam 40 DLR 1988 HD 58 at p. 69

have been carried out in Pakistan or Bangladesh. It is found in the west that in many cases convicted persons make false confessions to the police for various reasons. For example :

1. Social origin of the person, possible promises or threats by other members of the community,

2. self sacrificing desire to exculpate others,[245]

3. a false confession in the hope of a recommendation of mercy,[246]

4. a false confession in a half dazed state,[247]

5. depressed psychiatric patients,

6. non-psychotic individuals feeling guilty about such things as sexual deviation,

7. perceptions distorted or deluded for a brief period,

8. during interrogation, the suspect is involved in complex decision making and the multiplicity of factors affecting him may make him vulnerable to false admissions,[248]

9. Physiological stress resulted from fatigue, deprivation of sleep, hunger, pain, etc. may make prisoners receptive to influence because they may be confused, their thinking may become uncritical and they may be in the state of heightened suggestibility,

10. One may confess to avoid being remanded in police custody,[249]

245Munsterberg, 1927, p. 144

246Munsterberg, 1927, p. 144; Gudjonsson, Gisli H. and James A. C. Keith 'False Confessions, Psychological effects of Interrogation, A discussion paper' in *Reconstructing the Past* edited by Arne Trankell, Deventer, 1982, pp. 253-269 at p. 267

247Munsterberg, 1927, pp. 137-171

248Gudjonsson and Keith, 'False Confessions, ...' 1982 at pp. 259-60

249Gudjonsson,Gisli, H. *The Psychology of Interrogations, Confessions and Testimony*, London, 1992, pp. 217 and 223

11. Cautioning suspects that they need not speak may reinforce an illusion of voluntary co-operation and may even help to establish rapport with the interrogator, [250] etc.

Some of those conclusions are chosen which is felt could be applicable to the situation in Pakistan and Bangladesh even in front of a magistrate. Therefore, as seen above, false confessions could be intentional or unintentional[251] which could be in some way equated with cognitive liability and motivational liability.[252] In Pakistan and Bangladesh, in criminal cases a confession to a police officer[253] or while in police custody[254] or confession caused by inducement, threat or promise is not admissible as evidence.[255] But a confession obtained by deceit, promise of secrecy, without warning the accused that he is not bound to make such confession or while he was drunk is relevant, although it will not be applicable in the Hudud cases in Pakistan.[256]

It can be said from personal knowledge of the author gained by chamber practice that there is a general awareness among the public that those persons who for whatever reason have been in police custody in either of these two countries, even for few hours, have *always*[257] complained of maltreatment, torture, beating etc., before they are presented to the magistrate. In the case of Mizanul

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250Inman, Marquita, 'Police Interrogations and confessions' in *Psychology in Legal Contexts* edited by Sally M.A. Lloyd Bostock, London et al, 1981, pp. 45-66 at pp. 54-5

251for more on this see Aiyar, T.L. Venkatarama, Justice S.C. Manchanda, R.B. Sethi, Justice T.P. Mukherjee and B.N. Sinha, *Fields Law Relating to Statements, Confessions and Proofs*, Allahabad, 1972, pp. 427-431

252This term is coined by the author of this thesis as against cognitive ability and motivational ability of a witness.

253Section 25 of the Evidence Act and Art. 38 of the Qanun-e-Shahadat; Karam Din and another v. The State 1989 P Cr. L J 8 at p. 14 [Karachi]

254Section 26 of the Evidence Act and Art. 39 of the Qanun-e-Shahadat

255Section 24 of the Evidence Act and Art. 37 of the Qanun-e-Shahadat

256Section 29 of the Evidence Act and Art. 42 of the Qanun-e-Shahadat

257emphasis supplied; see chapter 1.4 for personal knowledge

Islam Dablu v. The State[258] the High Court in Bangladesh took notice of the fact that the convicted prisoner was severely beaten while in police custody, for which he had to be taken by stretcher for treatment. The Court declined to accept the confession as voluntary in the case of Farid Khan v. The State,[259] where it was proved that the police tortured the condemned accused. One would expect the Courts to remind the police not to maltreat the prisoners. In Karam Din and another v. The State[260] the High Court in Pakistan took note of the fact that police not only beat the person they suspect but also his family to force him to confess. Abdul Gafoor and 6 others is a glaring example of the atrocities of the police and high ranks of Pakistan.[261] There is no case yet, within the period of case law seen for this thesis, where the Court has considered it as its duty to take note of this. In this circumstance when a convicted person is taken to a magistrate one wonders how many truthful statements are made by those stressed and tired convicted persons who have come from police custody.[262]

It seems from the case law that it is presumed in Pakistan and Bangladesh that the risk of false confession is diminished or even eliminated by adherence to procedural safeguards as embodied in the Code. In a Pakistani case it is observed that a confession is admissible in evidence even if it is voluntary but false.[263] The position is worse

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258 Mizanul Islam Dablu v. The State 41 DLR 1989 AD 157 at p. 164

259 Farid Khan v. The State 45 DLR 1993 HD 171 at pp. 177-181

260 Karam Din and another v. The State 1989 P Cr. L J 8 at p. 16 [Karachi]

261 Abdul Ghafoor and 6 others v. The State 1984 P Cr. L J 2119, if tracked down, only the lower police officers get punished.

262 For details on police power in cognizable offences see Iyer, Ramaswamy, *Everybody's Book of Law?* Madras, 1951, pp. 122-3. The author has described it in the context of India. The law of India in this regard is similar to the laws of Pakistan and Bangladesh. Nowhere it is stated that the police has the right to beat the arrested persons to extract confession.

263 Khanzada Mir v. The State PLD 1979 Peshawar 215 at pp. 219-20

in Bangladesh because time elapsed between the time of arrest and confession is not taken into account, as seen in the above two cases.[264]

Because of a lack of study of the social and psychological reasons of confession it is not known whether or how often false confessions are made in criminal cases in Pakistan and Bangladesh. The Courts need to be more on their guard.

It may be mentioned here that the Law Commission of India recommended that in certain circumstances confession made to a police officer should be admissible under section 25 and 26 of the Evidence Act.[265] Later the Law Commission of India has recommended amendment in the Evidence Act as section 114B to the effect that if a person, having remained in police custody is found to receive bodily injuries, the presumption would be against the police officer having custody of that person. The Law Commission claims that the proposed amendment not only attracted support from the public but also from a few senior police officers in India.[266] It would be very helpful if the Law Ministry both in Pakistan and Bangladesh considered seriously the matter of police custody. This would be a safety measure against the innocent being ensnared in false cases due to false confession. But it seems that in Pakistan and Bangladesh the admissibility of a confession made in front of a police officer would be unsafe.

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264 Hazrat Ali and Abdur Rahman v. The State 42 DLR 1990 HD 177 at pp. 187-8; Abdur Rouf and others v. The State 38 DLR 1986 HD 188 at p. 196

265 *Law Commission of India, 48 Report on some questions under the Code of Criminal Procedure Bill, 1970,* Ministry of Law and Justice, Government of India, July 1972, pp. 6-7

266 *Law Commission of India, 113 Report Injuries in Police Custody suggested section 114B Evidence Act,* Ministry of Law and Justice, Government of India, 29th July 1985, pp. 2-3

5.3 Testimony on Testimony

In Islamic law testimony on testimony is lawful except for in cases of Hadd offence.[267] To the testimony of a man, the testimony of two men or one men and two women is required. The testimony of secondary witnesses is not to be received except when the original witnesses are dead, or too ill to appear before the judge, or absent at the distance of a journey of three days and three nights.[268] A retired or secluded woman can also avail of this form of testimony. A dying declaration in Islamic law is a part of testimony on testimony or hearsay evidence covered by the exclusionary rules. There is a subtle difference between hearsay evidence and testimony on testimony in Islamic law. Hearsay evidence in Islamic law is what a person knows from his knowledge due to some notoriety of the fact. Testimony on testimony or Shahada ala Shahada is when the original witness calls on to at least two man or one man and two women to testify on his behalf. In the case of a dying declaration it would be the manner of the death of the dying person that the secondary witnesses have to testify to. Dying declarations can be proven in Islamic law by both hearsay evidence, in the Islamic legal sense, if the fact has become notorious, or by secondary oral evidence. In Pakistan and Bangladesh no such difference is made. It is only considered as a weak type of evidence due to secondary oral evidence or hearsay evidence. Hearsay evidence is testimony in Court, to written evidence, of a statement made out of Court, the statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-

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267Article 71 of the Qanun-e-Shahadat
268Baillie, 1875, pp. 432-3

of-Court asserter.[269] It is believed that hearsay statements present risks of sincerity, perception, recordation and recollection, and narration even if the statements' relevance depends on the falsity, rather than the truth.[270] It is possible that the rule of hearsay evidence operates in the same manner irrespective of the reliability or unreliability of the hearsay and irrespective of the availability or unavailability of the declarant[271] due to the scrutiny of the Court of the witnesses both in direct as well as indirect evidence. Therefore the belief that direct evidence is usually better than hearsay could be irrelevant.[272]

5.3.1 Dying Declaration

A dying declaration is a statement of a person who is since dead about the cause of his death or circumstances leading to his death.[273] In Islamic law the dying declaration by the deceased is recognised both for civil[274] and criminal cases.[275] Any grievous hurt resulting in death, necessitates Qisas, or payment of Diyat as the case may be, on the statement of the deceased to the persons present in his deathbed. [276]

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[269]Graham, Michael H., *Evidence, Text, Rules, Illustrations and Problems The Commentary Method*, Minnesota, 1983, p. 73

[270]Graham, "Stickperson Hearsay": .....' 1992 at p. 462

[271]Davis, Kenneth Culp, 'An approach to Rules of Evidence for non Jury cases' in *Evidence and Proof* edited by William Twining and Alex Stein, Aldershot et al, 1992, pp. 315-319 at p. 317

[272]Davis, Kenneth Culp, 'An approach to Rules of .....' 1992 at p. 317

[273]Nurjahan Begum v. The State 42 DLR 1990 AD 130 at p. 132

[274]*Hedaya*, 1791, Vol. III, p. 161; Coulson, N.J., *Succession in the Muslim Family Law*, Cambridge, 1971, pp. 259-79

[275]Siddiqi, Muhammad Iqbal, *The Penal Law of Islam* 1st ed., New Delhi, 1991, p. 149

[276] *al Risala* , 1961, p. 121; *Al Muwatta* by Imam Malik ibn Anas, The First Formulation of Islamic Law translated by Aisha Abdurrahman Bewley, London et al, 1989, p. 372

The word dying declaration is nowhere mentioned in section 32 of the Evidence Act or article 46 of the Qanun-e-Shahadat.[277] It is considered as substantive evidence under the above mentioned section and article, once it is admitted in evidence.[278] The rule applies both to civil and criminal cases. In a criminal case the statement should be as to the circumstances which resulted in his death.[279] The dying declaration need not be a narrative of all facts. The law requires it only to state the cause of his death. Other unnecessary omissions are immaterial.[280] It may be oral or written. It is immaterial to whom it is made, whether to a private person or to a police officer or to a magistrate.[281] It may be indicated by signs and gestures in answer to questions if the person is not in a position to speak.[282] An oral dying declaration needs careful scrutiny[283] specially if it is not mentioned in the first information report[284] most probably because there is more chance of adding words to the mouth of the deceased by the living witnesses who might gain some interest by doing so. A dying declaration is a valuable piece of evidence and if it is free from suspicion and believed to be true it can be made sole basis of the conviction of the accused[285] in very

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277 Nurjahan Begum v. The State 42 DLR 1990 AD 130 at p. 132

278 Sk Shamsur Rahman Shamsu v. The State 42 DLR 1990 AD 200 at p. 203

279 Lutfun Nahar Begum v. The State 27 DLR 1975 AD 29 at p. 33 following Prakala Narayan Swami v. The King Emperor LR 1939 Indian Appeal LXVI pp. 66 and 76

280 Haq Nawaz v. The State 1987 P Cr. L J 137 at p. 141 [Lahore]

281 Munir Ahmad v. State PLD 1986 Quetta 26 at p. 42; Sk Shamsur Rahman Shamsu v. The State 42 DLR 1990 AD 200 at p. 206

282 Nurjahan Begum v. State BLD 1990 AD 61 at p. 63

283 Gadu Mia and others v. The State 44 DLR 1992 HD 246 at p. 251

284 A. Alim v. State 45 DLR 1993 HD 43 at p.47 following Golam Khan v. State PLD 1965 Peshawar 11; An oral dying declaration made to the mother and two other witnesses was accepted to be true in Sher Zaman alias Shero v. The State 1983 P Cr. L J 2519 at pp. 2525-6 [Peshawar]

285 Bahar Qureshi and 2 others v. The State 1993 496 at p. 499 [Karachi]; Umar Hayat v. The State 1990 P Cr. L J 125 at p. 129 [Peshawar]; Tuku Miah v. The State BLD 1983 HCD 193 at p. 196; Lal Zarif v. The State PLD 1982 Peshawar

exceptional circumstances, e.g. whether the maker of the statement was immune from all rancour, animosity and resentment against the accused, whether the statement by itself is completely reliable and whether the persons deposing to it are of unimpeachable integrity so that their words are above doubt.[286] Whether a dying declaration would be adequate to base conviction upon it, and further, what value is to be attached to it, would depend upon the concomitant circumstances of each case.[287]

For recording of a dying declaration or treating a statement as a dying declaration there is no particular procedure or formality which has to be followed as a precondition for treating a statement within article 46 of the Qanun-e-Shahadat and section 32 of the Evidence Act. A mere technical defect in recording a statement would not make it inadmissible in evidence.[288] Some of the main tests the Court has to judge for determining its authenticity are :

whether the maker had the requisite capacity to make the dying statement;

whether the maker had the opportunity to recognise the assailants;

whether there were chances for mistake on the part of the dying man in identifying and naming his assailants;

whether it was free from prompting from any outside quarter;

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148 at p. 151 following Abdur Razig v. The State PLD 1964 Pesh. 67 and PLD 1960 Lah 723 ; Munir Ahmad v. State PLD 1986 Quetta 26 at p. 42; Sk Shamsur Rahman Shamsu v. The State 42 DLR 1990 AD 200 at p. 210

[286] Imdad Ali Khoso v. The State 1979 P Cr. L J 496 at p. 501 [Karachi]; Ragoo alias Bagan v. The State 1984 P Cr. L J 2713 at p. 2720 [Karachi]; The State v. Muhammad Khan 1984 P Cr. L J 2852 at pp. 2856-7 following Tawaib Khan and another v. State PLD 1970 SC 13; Khalid Mahmood alias Babu v. The State 1985 P Cr. L J 1040 at p. 1045 [Peshawar]

[287] Sardood and 2 other v. The State 1984 P Cr. L J 649 at p. 656 [Peshawar] following Ghulam Jilani and 6 others v. The State PLD 1970 Lah 73 ; Roshan alias Tooh v. The State 1982 P Cr. L J 765 at p. 769 [Karachi]; State v. Safdar and another 1989 P Cr. L J 1972 at p. 1978 [Peshawar]

[288] Nisar Ahmad v. The State 1981 P Cr. L J 476 at pp. 479-80 [Lahore]

whether the witnesses who heard the deceased making his statement heard him correctly and whether their evidence can be relied on. In other words whether it had been correctly and faithfully recorded;[289]

the dying declaration should not run counter to or be inconsistent with the prosecution story;[290]

the integrity, demeanour and veracity of the person making the dying declaration is also important.[291]

In most of the cases a dying man is rushed into the hospital. The Courts put emphasis on the presence of doctors, nurses and investigating officers during the recording of dying declaration in hospitals as statements under section 164 of the Code of Criminal Procedure. If the certificate of fitness of the deceased to make a dying declaration by the doctor is present, the dying statement is recorded by a police officer who comes in the hospital on an emergency call from the doctor, and the dying declaration bears the signature of the doctor, such dying declaration are considered true in the eye of law.[292] The procedure for recording the dying

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289 A Alim v. State 45 DLR 1993 HD 43 at p. 47; Bulu v. State 45 DLR 1993 HD 79 at p. 85 following Amjad Ali v. The Crown 7 DLR 346; Muhammad Kabir alias Kala v. The State 1992 P Cr. L J 2222 at p. 2225 [Supreme Appellate Court]; Sk Shamsur Rahman Shamsu v. The State 42 DLR 1990 AD 200 at p. 203; Hafizuddin v. The State 42 DLR 1990 HD 397 at p. 401; Ashiq Mir and 4 others v. The State 1987 P Cr. L J 2101 at p. 2107 [Peshawar]; Munir Ahmad v. State PLD 1986 Quetta 26 at p. 42; Mst. Gulab Jan and another v. The State and another 1985 P Cr. L J 1162 at pp. 1164-5 [Azad J&K]; Khurshid Ahmad Shah and 4 others v. The State 1981 P Cr. L J 67 at p. 75; Sardood and 2 others v. The State 1984 P Cr. L J 649 at p. 656 [Peshawar]

290 Muhammad Kabir alias Kala v. The State 1992 P Cr. L J 2222 at p. 2225 [Supreme Appellate Court]; Nazim Khan v. State PLD 1984 SC 433 at p. 438

291 Mst Gulab Jan and another v. The State and another 1985 P Cr. L J 1162 at p. 1167 [Azad J&K]

292 Muhammad Khalid and another v. The State 1982 P Cr. L J 1176 at p. 1188 [Lahore]; in a reverse case like Muhammad Akbar alias Bachhi v. The State 1982 P Cr. L J 120 at p. 123 [Lahore] the dying declaration was considered not true; other cases considered as genuine in similar circumstances are Muhammad alias Mammi and others v. The State 1983 P Cr. L J 1183 at p.

declaration is that a doctor should not venture to record the dying declaration of a dying person himself. He should procure the services of the magistrate through a police officer. A doctor could only record the dying declaration in exceptional circumstances, where he firmly believes that the dying person is not likely to survive for sufficient time and valuable evidence is going to be lost in the process. The dying declaration recorded in this manner must be in the presence of respectable witnesses and he has to get the signatures or thumb marks of the dying person and the witnesses. This is to ensure that the doctor does not connive with the accused party in destroying the prosecution case.[293] The difference between oral dying declaration and the one recorded under section 164 of the Code of Criminal Procedure is that the declaration which has been recorded by a magistrate containing the certificates of the doctor about the fitness of a person is on much higher footing than that of a dying declaration based on oral testimony which may suffer from all human infirmities.[294]

When the dying declaration appears to be truly recorded it can be believed.[295] As a maker of a dying declaration is not subject to cross examination, the Court has to carefully scrutinise all the physical

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1191 [Lahore]; Bahawal and 2 others v. The State 1985 P Cr. L J 2524 at p. 2528 [Lahore]; Abdul Majid and others v. The State 1986 P Cr. L J 1354 at pp. 1360-1 [Lahore] the dying declaration was recorded the same day of admission into the hospital at the presence of the doctor although the dying person lived for another 20 days.

[293] Munawar-uz-Zaman and another v. The State 1989 P Cr. L J 395 at pp. 399, 400 and 401 [Lahore]; for the definition of respectable person see chapter 4.2.3

[294] Jamait Ali Shah v. The State 1993 P Cr. L J 1547 at p. 1552 [Shariat Court (AJ&K)]

[295] Muhammad Akbar and 2 others v. The State. PLD 1991 SC 923 at pp. 928-9; Muhammad Sharif v. The State 1986 P Cr. L J 637 at p. 643 [Karachi]

circumstances as they appear from evidence.[296] If a dying declaration does not corroborate ocular testimony it becomes doubtful.[297]

It is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under expectancy of death.[298] This is in accordance with the traditional Islamic law.[299] A statement under section 161 of the Code of Criminal Procedure of an injured is an admissible evidence even though the injured had died much later.[300] To treat the statement of an injured person as a dying declaration, death should ensue from the incident.[301] But how much later a person should die[302] or how serious the physical condition should be[303] is not clear.

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296 Munir Ahmad v. State PLD 1986 Quetta 26 at p. 42; Sk Shamsur Rahman Shamsu v. The State 42 DLR 1990 AD 200 at p. 203; Bulu v. State 45 DLR 1993 HD 79 at p. 86 following Khushal Rao v. State of Bombay AIR 1958 SC 203 and Thown Kaune Pompeach and another v. The State of Mysore AIR 1965 SC 939

297 Asad Azhar v. The State 1984 P Cr. L J 990 at p. 993 [Karachi]

298 Mst. Shamim Akhter v. Fiaz Akhtar PLD 1992 SC 211 at p. 220; Muhammad Hussain and 3 others v. The State 1983 P Cr. L J 2537 at p. 2541 [Lahore]; Banho v. The State PLD 1982 Karachi 881 contrary view Hayatullah v. The State 1969 P Cr. L J 724; Ali Gul and 3 others v. The State 1980 P Cr. L J 1190 at p. 1197

299 Coulson, 1971, p. 264

300 Mst. Shamim Akhter v. Fiaz Akhtar PLD 1992 SC 211 at p. 220

301 Gulab and another v. The State 1984 P Cr. L J 1781 at p. 1784 [Karachi]

302 The person, in Mst. Shamim Akhter v. Fiaz Akhtar PLD 1992 SC 211 at p. 218, died after more than a month; in Fateh Muhammad v. The State PLD 1981 Lahore 403 at p. 428, died approximately after 7 months; in Allah Warayo v. The State PLD 1985 Karachi 724 at p. 728, died after few hours but the dying declaration was withheld by the prosecution, if produced for evidence it would have been admissible; in Muhammad Nawaz v. The State PLD 1979 Baghdadul Jadid 42 at pp. 46-7, died after couple of hours; in Ghulam Shabbir v. State PLD 1983 Lahore 649 at pp. 653 and 7, died after 5 days; in Banho v. State PLD 1982 Karachi 881, died after 13 hours; in Mst. Shamim Akhter v. Fiaz Akhtar PLD 192 SC 211 at p. 218, died after more than a month from the date of dying declaration

303 Banho v. State PLD 1982 Karachi 881 at p. 887, contrary view Hayatullah v. The State 1969 P Cr. L J 724

The dying declaration is to be adjudged on its own merits.[304] Where the trial Court held that false witnesses were introduced in the dying declaration,[305] or the dying declaration was inconsistent with the prosecution story supported by chance witnesses,[306] or it was full of contradictions and improvements[307] or where all the eye witnesses agreed that the victim became unconscious immediately after receiving injury,[308] or the only witness to the dying declaration had deep motive in the outcome of the case,[309] or when the prompting or tutoring of the relatives could not be excluded,[310] or when the deceased was surrounded by relatives in a police station where the dying declaration was recorded, [311] or when the deceased could not have been conscious at the time of making the statement,[312] or when the doctors and investigating officer differed as to the way the dying declaration was made,[313] or where the dying declaration recorded by the investigating officer is word by word copy of the first information report,[314] or it was made by an interested and inimical person after delay though there was opportunity to record it earlier,[315] then the dying declaration lost

304 Mst. Shamim Akhter v. Fiaz Akhtar PLD 1992 SC 211 at p. 219

305 Muhammad Anwar v. State PLD 1984 Lahore 132 at p. 137 following Zarif Khan v. The State PLD 1977 SC 612

306 Nazim Khan v. State PLD 1984 SC 433 at p. 438

307 Asal Khan v. The State 1990 P Cr. L J 437 at p. 442 [Peshawar]; Shujaat Ali v. The State 1987 P Cr. L J 601 at p. 605 [Lahore]

308 Abdul Rehman v. The State 1988 P Cr. L J 1523 at p. 1526 [Peshawar]

309 Shamus Gul v. State PLD 1983 Peshawar 48 at pp. 54-5 following Sikandar v. The State 1975 P Cr. L J 1229, Mahmood Khan v. Ahmed and two others 1972 SCMR 620 and Nasir Ahmed and another v. The State 1980 P Cr. L J 57

310 Ali Zaman v. Miskin PLD 1988 Peshawar 143 at p. 144

311 Nazim Khan v. State PLD 1984 SC 433 at p. 437 following Ghulam Farid v. The State PLD 1966 SC 264, Usman Shah v. The State 1969 P Cr. L J and Wahiuddin and 5 others v. Allah Ditta 1977 SCMR 72

312 Abdul Majid v. State PLD 1984 Lahore 450 at p. 454; State v. Mansab Khan 1981 P Cr. L J 1128 at p. 1130 [Lahore]

313 Farman Ali v. State PLD 1980 SC 201 at p. 204-5

314 Mureed v. The State 1987 P Cr. L J 256 at p. 260 [Lahore]

its evidentiary value. A statement by a dying man who had a long criminal history is difficult to believe without corroboration from an unimpeachable source.[316]

It is often found that a dying declaration made elsewhere than at a thana (police station) is more worthy of reliance than one made in the presence of the police, where also the relatives who have brought the injured man to the thana are generally present and usually cannot be prevented from putting a prepared case through the mouth of the deponent.[317] A dying declaration made in the absence of relatives, friends and prosecution witnesses is considered more reliable.[318]

Conversely where a dying declaration was recorded by a magistrate excluding the relatives,[319] or by a police officer in a free atmosphere,[320] or in the presence of a doctor corroborated by disinterested witnesses,[321] or it was found genuine by corroborating with circumstantial evidence although the eye witnesses were interested and partisan,[322] or when the dying declaration was

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315 Nazim Khan v. State PLD 1984 SC 433 at p. 437 following Ghulam Farid v. The State PLD 1966 SC 264

316 Muhammad Hussain and others v. The State 1983 P Cr. L J 2537 at p. 2542 [Lahore]

317 Nazim Khan v. State PLD 1984 SC 433 at p. 437 following Ghulam Farid v. The State PLD 1966 SC 264

318 Ghulam Muhammad v. The State 1985 P Cr. L J 915 at p. 920 [Karachi] following Nazim Khan v. State 1984 SCMR 1092, Ghulam Farid v. State PLD 1966 SC 264, Usman Shah v. State 1969 P Cr. L J 317 and Wahiuddin v. Allah Ditta 1977 SCMR 72; Arshad alias Ashraf v. The State 1985 P Cr. L J 1728 at p. 1731 [Lahore] ; Ashiq Mir and 4 others v. The State 1987 P Cr. L J 2101 at p. 2107 [Peshawar]

319 Nazim Khan v. State PLD 1984 SC 433 at p. 437 following Ghulam Farid v. The State PLD 1966 SC 264, Usman Shah v. The State 1969 P Cr. L J 317, and Wahiuddin and 5 others v. Allah Ditta 1977 SCMR 72.

320 Mst. Mukhtaran Bibi v. State PLD 1987 Lahore 586 at p. 590; Ayub v. The State 1980 P Cr. L J 201 at p. 211 [Peshawar]

321 Allah Bakhsh v. State PLD 1980 Lahore 601 at pp. 604-5

322 Ghulam Shabbir v. State PLD 1983 Lahore 649 at p. 660 following a bunch of case from 1972 until 1978, Muhammad Latif and another v. Muhammad Hussain and others PLD 1973 SC 406; Ali Akhtar Hussain v. The State 1972

substantiated by natural witnesses,[323] or it gave a precise account and corroborated by medical evidence[324] or in the absence of an endorsement by the doctor on the written dying declaration which was otherwise found to be true and genuine,[325] or it did not suffer from self contradictions or dishonest improvements[326] the dying declaration was considered worthy of credence.

Fateh Muhammad v. The State[327] is an example of the time lapse expected by the judiciary to accept the statement as a dying declaration. A report was lodged by the deceased earlier on 15-10-1974 in the Daily Dairy of the Police stating that he apprehended murder from the present appellants. This document was not treated as a dying declaration because its recorder was still alive when the report was made. He died on 6-5-1975. The vital question that how soon the person should die or what are the circumstances that will give a statement the status of dying declaration were not elaborated in this judgement.

The following two cases are examples where the dying declaration was considered as true despite some suppression of the fact voluntarily or involuntarily.

SCMR 40; Khan Zaman v. Kachkol etc. 1972 SCMR 574; Sher Bahadur v. The State 1972 SCMR 651; Muhammad Abdullah v. Muhammad Safdar Khan 1973 SCMR 25; Wahiuddin v. Allah Ditta 1977 SCMR 72; Zarif Khan v. State PLD 1977 SC 612; Muhammad Yasin v. The State 1978 SCMR 303; Ali Asghar v. The State PLD 1968 Pesh. 47; Niamat Ali v. The State 1981 SCMR 67; Waheed Khan v. The State 1981 SCMR 1256; Sharif v. The State 1973 SCMR 83; Fazal Muhammad v. The State 1973 SCMR 432; Roshan v. State PLD 1977 SC 557 and Wazir Gul v. The State 1976 SCMR 471.

323 Sherdil and another v. The State 1980 P Cr. L J 919 at p. 924 [Karachi]

324 Tasaddaq Elahi and 3 others v. The State 1985 P Cr. L J 2226 at pp. 2230-1[Lahore]

325 Lal Zarif v. The State PLD 1982 Peshawar 148 at p. 150 following Abdur Raziq v. The State PLD 1964 Pesh. 67 and PLD 1960 Lah 723

326 Muhammad Din and 2 others v. The State 1988 P Cr. L J 238 [Lahore]

327 Fateh Muhammad v. The State PLD 1981 Lahore 403 at p. 428

The entire evidence of the eye witnesses as well as the dying declaration were not rejected in the case of Iftikhar Ahmad v. State[328] merely on the ground of suppression of the two injuries of the two appellants by the eye witnesses. The failure on the part of the deceased to explain the injuries of the two appellants in his dying declaration did not affect its veracity adversely. The deceased was seriously injured and could not be expected to make a detailed narration of the occurrence. Furthermore in cases of this kind, more particularly when there was a cross case against the eye witnesses, the suppression of the injuries of the opposite party in order to minimise the part played by them was considered understandable by the Court.

In the case of Muhammad Ashraf v. State,[329] the prosecution case is based on ocular testimony, two dying declarations of the two deceased and abscondence of the appellant. One of the eye witnesses was interested and inimical towards the appellants, but he was corroborated by two independent and natural eye witnesses. It was a daytime occurrence. The dying declaration of the man and the woman corroborated the ocular testimony. The sub inspector had taken all the necessary precautions in recording it. It was recorded after obtaining a certificate of fitness from the doctor. The dying declarations of the man and the woman corroborated each other in implicating the appellant. Though the man did not mention the injuries of the woman in his dying declaration, the omission of the name of the woman deceased as having been injured during the occurrence appeared to the Court to be quite natural. After receiving fourteen gun-shot injuries he could not be expected to observe or

328 Iftikhar Ahmad v. State PLD 1987 Lahore 492 at p. 502
329 Muhammad Ashraf v. State PLD 1984 Lahore 378 at p. 382

notice as to who else had been injured and as to where the pellets had struck.

It appears that none of these two cases or the cases mentioned above are considered to be true on their face value. Each one of them is accepted or rejected depending on the surrounding evidence related to the issue.

5.3.1.1 Evidentiary Value of a Dying Declaration

A recent case law in Pakistan declared that a party cannot be forced to become a witness.[330] It has to be presumed on that principle, in cases of Qatl where the victim is no more there to testify, the dying person in Pakistan was willing to be a witness. Only then it seems the rule of Shahada ala al-shahada can be applied to dying declarations in Pakistan. Since the decision is from a High Court it is not a binding law. It seems until now the Courts in Pakistan while deciding cases based on dying declaration have not entered into a debate as to the status of a dying victim as a party or a witness. There is no such technical problem in Bangladesh yet.

Elizabeth F. Loftus, in the context of the west says, a dying declaration may rest on faulty psychological assumptions, therefore it should be treated with care similar to the witness testimony, rather then attaching sanctity to it.[331] The case law of recent years would show that Courts in Pakistan and Bangladesh are careful in accepting dying declarations. A dying declaration is subjected to very close scrutiny because the accused had no opportunity of

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330 Mst Umran Jee v. District Kohat and 3 others PLD 1990 Peshawar 100 at pp. 102 and 104

331 Loftus, Elizabeth F., 'Eyewitness Testimony : Psychological Research and Legal Thought' in *Crime and Justice An Annual Review of Research* Vol.3 edited by Norval Morris and Michael Torny, Chicago, 1981, pp. 105-151 at p. 144

testing the veracity of the statement by cross examination,[332] neither had it been made on oath.[333] The Courts consider it as worse than an ordinary witness testimony, as the maker of the dying declaration cannot be subjected to cross examination.[334] A dying declaration, like statement of witnesses, or rather like interested witnesses,[335] is subject to analysis on their own inherent value.[336] The reliability of a dying declaration is to be tested like a statement by a living person[337] and weighed in the light of the surrounding circumstances.[338] The dying declaration, like witness testimony, may be questioned on the ground of cognitive credibility and motivational credibility. Sometimes the condition of the dying person becomes so precarious it is possible that, due to the shock of the injury, his memory becomes weaker and confuses his intellectual powers to recognise or identify the real culprit.[339] It is also possible that the dying man at the last moment may introduce

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332 Shahdin v. State PLD 1984 Lahore 132 at p. 136; Sk. Shamsur Rahman v. The State 42 DLR 1990 AD 200 at p. 203; Muhammad Hussain and others v. The State 1983 P Cr. L J 2537 at p. 2541 [Lahore]; Abdul Ghani and 3 others v. The State 1979 P Cr. L J Note 157 at p. 101=PLD 1979 Lahore 490 at p. 496

333 Khurshid Ahmad Shah and 4 others v. The State 1981 P Cr. L J 67 at p. 75

334 Bulu v. State 45 DLR 1993 HD 79 at p. 86; Shamboo alias Shahmir v. The State 1991 P Cr. L J 228 at p. 233 [Karachi] In Shahdin v. State PLD 1984 Lahore 132 at p. 136 following Zarif Khan v. The State PLD 1977 SC 612 it was however held that such a statement stands on the same footing as other piece of evidence.

335 Jamait Ali Shah v. The State 1993 P Cr. L J 1547 at p. 1551 [Shariat Court (AJ&K)]; Sardood and 2 others v. The State 1984 P Cr. L J 649 at p. 656 [Peshawar] following Abdul Ghani and 3 others v. The State PLD 1979 Lah 490; Ghulam Habib v. Rahim Gul and 2 others 1992 P Cr. L J 384 at p. 388 [Peshawar]; Altaf Hussain v. The State 1981 P Cr. L J 525 at p. 529 [Karachi] following Tawaib Khan and another v. The State PLD 1970 SC 13, Ghulam Hussain v. The State PLD 1974 Kar 91, Amanullah and 4 others v. The State PLD 1978 Kar 792 and Zarif Khan v. The State PLD 1977 SC 612

336 Abdul Ghani and 3 others v. The State 1979 P Cr. L J Note 157 at p. 101

337 Banho v. State PLD 1982 Karachi 881 at p. 888

338 Munawar Alam Masih v. The State 1984 P Cr. L J 576 at p. 580 [Lahore]; Sardood and 2 others v. The State 1984 P Cr. L J 649 at p. 656 [Peshawar] following Ghulam Jilani and 6 others v. The State PLD 1970 Lah 73

339 A. Alim v. State 45 DLR 1993 HD 43 at p. 47

false elements due to enmity.[340] A single false element in the dying declaration would create doubt as to the statement in its entirety. It cannot be said that it is a statement of a truthful person who has made the statement in realisation of his obligations to adhere to the truth while he is quitting his worldly existence to join the Creator to whom he is answerable for his deeds[341] because the moral fibre of society has become weak.[342] It was laid down in Tawaib Khan v. The State[343] that although the dying declaration of the deceased has a degree of sanctity under the law, but in the administration of criminal justice, in view of the present state of the society, the assessment of evidence, whether it is a statement of a witness or the statement of a person who is dead, is essentially an exercise of human judgement to evaluate the evidence so as to find out the truth from the falsehood.[344] The principle is that no rigid rule can be made, to the effect that a person who is injured and is under an apprehension of death, would suddenly be gifted by magic transformation with a clean conscience and a purity of mind to shed all the age-old habits and deep-rooted rancour and enmities. A close scrutiny of a dying declaration like the statements of interested witnesses is absolutely necessary. As the maxim *falsus in uno falsus in omnibus* is no longer applicable,[345] it is considered necessary by

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340 Banho v. State PLD 1982 Karachi 881 at p. 888

341 Bulu v. State 45 DLR 1993 HD 79 at p. 86

342 Muhammad Hussain and others v. The State 1983 P Cr. L J 2537 at p. 2541 [Lahore]

343 PLD 1970 SC 13 cited in Ghulam Hussain v. The State 1979 P Cr. L J 775 at p. 780 [Karachi]; the same case also followed Zareef Khan v. The State PLD 1977 SC 612

344 similar view taken in Mir Bashai v. The State 1990 P Cr. L J 1225 at p. 1229 [Peshawar]; Sikandar v. The State 1990 P Cr. L J 396 at p. 401 [Karachi]; The State v. Ghulam Jilani and others 1990 P Cr. L J 597 at p. 604 [Peshawar]; Akbar Ali Khan v. Sahib Noor and another 1981 P Cr. L J 710 at p.712 [Peshawar]

the Courts to assess and evaluate the evidence of witness testimony or dying declarations to find out the truth and the deceit in the statements.[346]

5.4 Conclusion

This chapter has made an attempt to survey the probative value of evidence acquired through human agencies by way of direct testimony and secondary testimony, in a dying declaration and confession. Islamic law as developed through the ages puts great emphasis on the testimony and confession through human agencies rather than written documents by themselves. These areas of Islamic law as administered in Pakistan and Bangladesh do not seem to vary greatly, in spite of the different fact finding systems, i.e. the inquisitorial system applicable in Islamic law and the adversary system applicable in Pakistan and Bangladesh.

Islamic law weighs multiple witness testimony to prove a case. It is apparent from reading the case law in Muslim India and the Hedaya that the judge is not to follow blindly the party having numerical superiority of witnesses. If this misconception has developed at any time in the Indian subcontinent, that is due to the misapplication of the law and not the law itself. The case law discussed in the previous and this chapter also proves that in Pakistan, where Islamic law is claimed to have been introduced, and especially in Bangladesh, which still follows the Evidence Act, no witness testimony is accepted without weighing the probative value of the testimony. Whereas in

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345 Ghulam Habib v. Rahim Gul and 2 others 1992 P Cr. L J 384 at p. 388 [Peshawar]

346 Banho v. State PLD 1982 Karachi 881 at pp. 887-8 following Tawaib Khan v. The State PLD 1970 SC 13 and Zarif Khan v. The State PLD 1977 SC 612; Abdul Hakim @ Lokman Hakim v. The State BLD 1988 AD 152 at pp. 153-4

Islamic law the testimony is weighed against another testimony, in Pakistan and Bangladesh the testimony is weighed against another testimony or other kinds of evidence. It is also seen in the second chapter on Muslim India that the judges often used to refer the case for inquiry and investigation without relying on testimony. Though in Pakistan in most of the cases categorised as Tazir and in almost all cases in Bangladesh, no particular number of testimonies is essential to prove a case, in practice multiple testimony or evidence from independent sources are considered as a rule to decide the case.

It is also seen from the above discussion that the practices in Pakistan and Bangladesh does not differ greatly with each other in essence, though in matters of details differences may occur. In the same manner, though it might at a superficial level seem that the probative value attached to testimony and confession differs from Islamic law to that of Pakistan and Bangladesh, a deep analysis proves that, in essence, the practice in Pakistan and Bangladesh is very near to Islamic law at least in these areas.

It is also seen that with the advance of science and technology, perhaps more precaution should be taken in accepting a confession, so that an innocent person is not turned into an accused.

This discussion is followed by the next chapter on female witness testimony to see if the law of evidence in Pakistan and Bangladesh has developed independent of Islamic law.

CHAPTER 6

6. Female Witness

In this chapter the legal status of women in Islam *vis a vis* their position as witnesses in Pakistan and Bangladesh is discussed. Neither female witnesses nor Zina are contested issues in Bangladesh, although in one instance, the influence of changes in the status of female witnesses, and in another, the influence of Zina Ordinance are marked. Pakistan introduced Hudud Ordinances in 1979. These laws barred women from being witnesses for a Hadd offence. In other words, even if they have witnessed a Hadd offence their testimony would not be valid from legal point of view. In 1984 article 17 of the Qanun-e-Shahadat equated the testimony of two women with that of a man in future obligations and financial matters. These rulings are construed from Qur'an and Prophetic Traditions. Prophetic Tradition is also known as Hadith or Sunna, and means the reported materials about what the Prophet said, did, approved or remained silent. Silence on his part is considered as his approval. There is a large body of Hadith literature. It has classified a sound Hadith from a defective one. The introduction of Qisas and Diyat law in 1992 as yet does not seem to have the much apprehended adverse effect on female witness testimony.

Hudud law seems to have affected the position of women very adversely. Compared to the Hudud law it seems the effect of article 17 of the Qanun-e-Shahadat is still minimal. The legality of Hudud Ordinance under the Constitution of Pakistan has already been challenged in the Court in the case of Begum Rashida Patel v. The

Federation of Pakistan.[1] After the introduction of the four Hudud Ordinances it appears that a large number of cases of Zina have been filed. The number of cases of theft, drinking, false accusation for Zina, i.e. Qazf, and other Hudud offences are far less than the number of Zina cases. The first reason for the huge number of Zina cases could be desire for revenge against someone. Disgrace of a woman in one family destroys the reputation of the whole family in societies like Pakistan and Bangladesh. The second reason could be that people have become more aware of the law and remedy. The third reason could be that a remedy has become available which was absent before because adultery and Zina are not the same thing. For whatever reason, Zina cases have greatly outnumbered other Hudud offences. This has caused great disadvantage and harm to the woman. She cannot be a valid witness to a cause of Hadd in which she was involved. She is practically considered as an abettor. She is accommodated only in Tazir offences, i.e. the outcome of the case changes with the change of the gender of the witness. As mentioned earlier in chapter 2.3.2 the lack of a male witness would be a legal impediment that causes the Hadd offence to Tazir offence. There are many instances where Zina bil jabr cases are decided as Zina cases, thereby putting the victim virtually in the position of an accomplice. An attempt is made in this chapter to find out whether a woman within the ambit of Islamic law could not have bypassed the provisions which ignore her as a witness.

It may be noted that Pakistan and Bangladesh participated in the Conference on Women held in Iraq in May, 1979. In one of the discussions it was decided that in many instances laws should be

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[1] Begum Rashida Patel v. Federation of Pakistan PLD 1989 FSC 95

promoted to ensure that women enjoy full capacity regarding their position and legal rights.[2] The Hudud laws were already in force in Pakistan from February of the same year. Since then no step has been made to promote the situation of women in Pakistan.

6.1 Legal Status of Women in Islam

The legal status of woman is conferred on her by the Qur'an, the Prophetic Traditions and by the analogical deduction of the jurists. Qur'an has raised the status of woman to that of a man in religious matters,[3] but there are controversies regarding some of the verses in the Qur'an as to the legal and social status of woman.[4]

The practice of the Prophet and his sayings as collected in the Hadith books are contradictory. They are used as a shield by various groups of people for establishing their argument.

The juristic views are also divided as to the status and rights of woman. Most of the jurists tended to lower the position of woman based on the alleged sayings of the Prophet, despite the fact that Prophet's practice was generally towards establishing an equal society. They read the Qur'an literally and in some matters they offer limited rights to woman. This results in a muddled structure of

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[2] *Conference on the Role of Women in Development of non Aligned and other Developing countries*, General Federation of Iraqi Women Secretariat of Studies and Researches. 6-13 May, 1979, p. 33

[3] Lemu, B. Aisha and Fatima Heeren, *Women in Islam*, Leicester, 1978, pp. 14-16; Taqi, Mesbah Muhammad, Muhammad Jawal Bahonar and Lois Lamya la-Faruqi, *Status of Women in Islam*, London, 1990, pp. 31-44

[4] for details of the controversy see, Levy, Reuben, *An introduction to the Sociology of Islam*, London, 1931, Vol. I, p. 190; Lemu and Heeren, 1978, pp. 18 and 42; Taqi et al,1990, p. 54, Mutahhari, Murtada, *The Rights of Women in Islam*, 1st. ed. Tehran, 1981, pp. 113-136; Roberts, Robert, *The Social Laws of the Qoran*, London et al, 1990, p. 28; Coulson, Noel and Doreen Hinchcliffe, 'Women and Law Reform in Contemporary Islam' in *Women in the Muslim World* edited by Lois Beck and Nikki Keddie, London et al, 1978, pp. 37-51

limited rights and full duties of a woman.[5] This is perhaps due to the fact that Islam has mostly flourished in patriarchal societies.

Those who reject the majority of the jurists view as not in accordance with the spirit of Islam rely on the practice of the Prophet. They argue the alleged sayings of the Prophet as weak or false Hadith. This group in favour of equality of woman with man form a minority. They also offer their own interpretations of the Qur'anic verses. While interpreting they take into account all the Qur'anic verses on the rights and duties of man and woman and the practice of the Prophet. They refuse to deal with isolated verses leaving out the rest of the Qur'an and the practice of the Prophet. The conclusion therefore could either be positive or negative for the woman but could not be both.

The stringent interpretation of the Qur'anic verses on women by the majority of the jurists has forced women to adhere to a law subversive to their own interest. This probably is because the women do not have the force and/or knowledge to disobey what the patriarchal society orders them to do. There have been women in these cultures who by dint of their calibre achieved high intellectual, legal and social status.[6] The women excelled in art,

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[5]Lemu and Heeren, 1978, pp. 18 and 42; Taqi, 1990, et al p. 54 , Mutahhari, 1981, pp. 113 -136; for legal status of women, in theory, in Bangladesh, see Khan, Salma, *The Fifty Percent Women in Development and Policy in Bangladesh*, Dhaka, 1988, pp. 15-21. The position is similar as far as women in Pakistan are concerned.

[6]for details on women see Waddy, Charis, *Women in Muslim History*, London and New York, 1980; Banerjee, Dr. S.K., 'Some Aspects of Muslim Polity in Early Medieval India, 1236-46 A.D.' in *Indian Culture*, July 1939-April 1940, Vol. VI., No. 3, pp. 295-305; Banerjee, S. K., 'Some of the Women relations of Babur' in *Indian Culture*, July 1937-April 1939, Vol. IV, No. 1, pp. 53-60; Levy, p. 187-190 Siddiqui, Dr. M. Z., 1961, pp. 142-156, Siddique, Dr. K., *The Struggle of Muslim Women*, Kingsville, 1986; Saiyid Ameer Ali, 'Islamic Culture under the Moguls' in *Islamic Culture*, 1927, pp. 499-521 at p. 512; Saiyid Ameer Ali, 'Islamic Culture in India' in *Islamic Culture*, 1927, pp. 334-357 at p. 335; for socio-economic and

literature and administration during the Sultanate and Mughal rule in India. For example, Sultana Razia was a highly accomplished woman.[7] It is even contended that Jan Begum, the daughter of Khan-i-Khanan (Chief of Khans, an office) was said to have written a commentary on the Qur'an. Badshah Akbar (ruled from 1556 A.D. to 1605 A.D.) rewarded her 50,000 dinars for her work.[8] These were not enough to change the deep rooted patriarchal chauvinistic attitude of the society. The legal status of Muslim woman was not only lowered, but the women were forced to the back row and silenced under the pretext of parda despite the rights guaranteed by the Qur'an and Prophetic practice, however controversial. This occurred in most of the Islamic society along with the Indian subcontinent where both the Muslim and the Hindu women shared the same fate under different religious contexts but to the same effect.[9]

The issue of female emancipation were raised by the newspapers from 1900 onwards in Bengal. Early marriage, parda, etc. were considered impediment to the due rights given to the women by

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political power of women in Bengal, Gupta, Sankar Sen, *A study of Women in Bengal*, Calcutta, 1970; for the position of women in politics and literature in Bengal see, Seely, Clinton B. (ed.), *Women, Politics, and literature in Bengal*; East Lansing, 1981

[7]Banerjee, S.K., 'Some Aspects.....' 1939-1940 at pp. 297-299

[8]Chopra, Dr. P.N., *Life and Letters under the Mughals*, New Delhi, 1976, pp. 121-2 and 129

[9]Mahmud argues that parda observance do not take away the fundamental rights of women, Mahmud, NY, pp. 265-9; for generally on the women in Bengal, Rohner, Ronald P and Manjusri Chaki Sircar, *Women and Children in A Bangali Village*, London, 1988; Hindus are a large minority in Bangladesh and a small minority in Pakistan, for the Hindu pardanashin women in Calcutta see Urguhart, Margaret H., *Women of Bengal A study of the Hindu pardanasins in Calcutta*, 2nd. ed., Calcutta, 1926, The observation made in Calcutta is true for the Hindu ladies in Pakistan and Bangladesh; Feldman and Carthy argue that parda is one of the factors influencing rural and town women's participation in the labour force, Feldman, Shelley and Florence E. Mc. Carthy, 'Conditions influencing Rural and Town Women's Participation in Labor Force' in *Women, Politics and Literature in Bengal* edited by Clinton B. Seely, East Lansing, 1981, pp. 19-30 at p. 26

Islam.[10] Moreover it must noted that women's parda doesn't determine that her activity should be confined to home only.[11] The words parda, zenana, harem, hijab, burka and jilbab are synonymous. Zenana, and harem[12] means complete seclusion. Parda,[13] and hijab,[14] means both seclusion and outer garments and veiling of the hair of a woman. The words burka, and jilbab are used for outer garments and veiling of the hair of a woman.[15] The veiling of the face is optional on the understanding of the woman herself.[16] Parda in the extreme sense of harem and lower position of women is a customary practice unknown to Qur'anic Islam.[17] As a customary practice parda later became the symbol of upward mobility and honour.[18] Parda gained such strength in the Indian subcontinent that the major Acts contain provisions on pardanashin women, to protect her honour.[19] A pardanashin woman is a woman who

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[10] Islam, Mustafa Nurul, *Bengali Muslim Public Opinion as reflected in the Bengali Press 1901-1930*, Dacca, 1973, p. 257

[11] Durrany, K. S., 'Women and Pardah' in *National Seminar on the Status of Women in Islam*, New Delhi, 18th and 19th July, 1983, pp. 79-92 at p. 88

[12] see for details Khan, Mazhar ul Haq, *Purdah and Polygamy A study in the Social Pathology of the Muslim Society*, Peshawar, 1972.

[13] see for details Khan, M. H., 1972.

[14] see for details Mernissi, Fatima, *Women and Islam: a historical and theological enquiry*, Oxford, 1991, pp. 85-180

[15] Alam, Shaista Aziz, 'Purdah and the Quran' in *Hamdard Islamicus*, 1990, Vol. XIII, No. 4, pp. 77-90

[16] Levy, 1931, pp. 179-182

[17] Esposito, John L., 'Women's right in Islam' in *Islamic Studies*, 1975, Vol. XIV, pp. 99-114 at p. 106

[18] Brijbhushan, Jamila, *Muslim Women in Purdah and Out of it*, New Delhi, 1980, p. 21

[19] e.g. proviso to section 48 of the Code of Criminal Procedure, 1898 lays down that the police officer must give notice before breaking open a zenana for search so that a woman is at liberty to withdraw. Section 52 of the Code of Criminal Procedure, 1898 provides that if the search of a woman is essential, it shall be done by another woman. Section 56 of the Code of Civil Procedure, 1908 says that the Court shall not order the arrest or detention in the civil prison of a woman in the execution of a decree for the payment of money. Moreover section 132 of the Code of Civil Procedure, 1908 lays down that a woman may be exempted to appear in Court in person, etc.

screens herself from the public.[20] It seems that there was a general presumption at the time the Acts were passed that a secluded women lacks knowledge on legal matters. There is a lot of case law protecting the property right of a pardanashin lady.[21] This had to be done to ensure her exclusive right to own property guaranteed by the Qur'an that could not be tampered with. In a recent case law, National Bank of Pakistan v. Hajra Bai,[22] the High Court of Karachi reconsidered the definition of a pardanashin lady based on an earlier decision, Taj Din v. Abdur Rehman,[23] of the same Court. The Court observes as *obiter dicta* that the criterion for the protective cloak available to a pardanashin lady is not because of her social status in the parda class. The emphasis is on the factual understanding to comprehend the contents of a document. This observation is deducted from Taj Din's case where the protection to pardanadshin lady or illiterate woman is extended to an illiterate male person for the property right. In Bangladesh the protection is available only to a parda observing woman irrespective of her literacy. It is not extended to illiterate woman who do not observe parda.[24] It is in this context of the parda that the position of female witness is discussed.

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[20] Ali, Maulavi Saiyid Ameer, *The Legal Position of Women in Islam*, London, 1912, p. 31

[21] Mst. Badshah Begum v. Ghulam Rasul and 4 others PLD 1991 SC 1140; Gaher Ali Mollah v. Hajera Khatoon 40 DLR 1988 HD 297; Rangbi Bewa v. Md. Abed Ali and others BLD 1987 HCD 319; Noab Chand v. Mst. Hossain Banu and others BLD 1986 HCD 173; Fazal Ahmed v. Achina Khatun 36 DLR 1984 HD 144; Mst. Rokeya Khatun v. Ali Jan Bepari 34 DLR 1982 AD 266=BLD 1982 AD 139; Jahura Khatun and another v. Md. Nurul Momen and others BLD 1982 HCD 165; Siddique Ahmad v. Gani Ahmad 33 DLR 1981 AD 1; Begum Nurunnessa Reza v. Akhlaque Rahman 28 DLR 1976 HD 20

[22] National Bank of Pakistan v. Hajra Bai PLD 1985 Karachi 431

[23] Taj Din v. Abdur Rehman PLD 1963 Karachi 825

[24] Siddique Ahmed Chowdhury and others v. Gani Ahmed and others 1979 BSCR 375 at p. 386

6.1.1 Hadd Offence

Testimony of women is not allowed in Islamic law for Hadd offence.[25] This is incorporated in the Hudud Ordinances of Pakistan.[26] This is a juristic theory without any basis from the Qur'an.[27] It is contended that it is based on the Tradition of the Prophet and the first two Khalifas.[28] But even this contention is not of much force because the Tradition is not considered sound.[29] Moreover it is possible that non acceptance of women witnesses for Hudud offences was more based on the practice of the city of Madina than the practice of the Prophet or the first two Khalifahs.[30] Therefore if women are considered as incompetent to testify to Hadd offence it is because of Ijma (consensus of opinion of the jurists).

Hudud offences are a latter creation of the jurists. There was no distinction between Hadd and Tazir offences during the Prophets time. The words Hadd and Tazir were used interchangeably.[31] There is an example during Prophets time in which he ordered the stoning to death of a person on the accusation of a woman who had been raped. The person was later acquitted because he confessed.[32] Two points would follow from here. i. Hadd punishment of Rajm (stoning to death) can be inflicted on the single testimony of the victim and

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[25] Baillie, 1875, p. 420

[26] see chapter 2.3.2

[27] Ansar Burney v. Federation of Pakistan PLD 1983 FSC 73 at p. 90, Hussain, A., *Status of Women in Islam*, p. 1987, p. 234

[28] *Hedaya*, 1791, Vol. II, p. 667

[29] Hussain, A, 1987 p. 259 also for details, pp. 259-264

[30] Hussain, A, 1987 p. 263 relied on 'Ila ul Sunnan, Vol. 15, p. 167

[31] Federation of Pakistan v. Hazoor Bakhsh PLD 1983 FSC 255 at pp. 286-290

[32] Hussain, A, 1987, p. 236 relied on Abu Daud Hadith 974

ii. confession does not necessarily lead to Rajm. One may be pardoned from Hudud offences.

If Hadd and Tazir are used interchangeably even today then by juristic theory it is inconsistent for a woman to be allowed to testify in Tazir cases as is the practice in the Courts of Pakistan. It would follow that she should be totally included or excluded from giving testimony in Hadd offence.[33] The main reason of the jurists for the Ijma that women should not be allowed to be a witness in Hadd Zina offence is that it is not dignified on their part to observe those offences.[34] Another reason is that it may not be necessary for women to go out from the house frequently.[35]

6.1.2 Qisas Offence

In traditional Islamic law, female witness testimony is excluded in Qisas punishment. This is considered to be derived from the Sunna of the Prophet and the first two Khalifas.[36] Qisas offence resulting in Qisas punishment of death can only be proved by two male witnesses. One male and two female witnesses or one male witness and an oath are allowed in Qisas of Jurh or injury by the Maliki school of thought.[37] The amended section 304 of the Penal Code provides that the proof for intentional killing (Qatl-i-Amad) shall be either by the voluntary and true confession of the accused made before a court competent to try the offence or by the evidence provided by article 17 of the Qanun-e-Shahadat. Article 17 expressly says that except for

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[33]Hussain, A, 1987, p. 266

[34]*Al Musannaf* by Abd al Razzaq al Sanani edited by Shaikh Habiburrahman, Beirut, 1972, Vol. 8, Hadith No. 15413; Hussain, A, 1987, p. 273

[35]*Hedaya*, 1791, Vol. II, p. 668

[36]*Hedaya*, 1791, Vol. II, p. 667

[37]El-Awa, 1982, p. 125

Hudud and financial obligations, the Court may accept or act on the testimony of one man or one woman or circumstantial evidence. Yet it also says that the competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunction of Islam as laid down in the Holy Qur'an and the Sunna. It therefore seems that in Qisas, punishment of death for commission of homicide (Qatl), female witnesses may be rejected in the cases decided in the Courts of Pakistan. However it may be noted that death penalty in the form of Tazir (al-Tazir bil-Qatl) is available for other heinous offences. It is yet to be seen how the Courts in Pakistan deal with Tazir bil Qatl and Qisas for Qatl in respect of female witnesses.

6.1.3 Financial and Other Matters

In financial matters and future obligations the testimony of two men or one man and two women is accepted.[38] This is construed from Sura 2 verse 282. This provision is incorporated in article 17 of the Qanun-e-Shahadat. There is a difference of opinion whether this verse is mandatory. Ibn Taimiyya (661 H./1263 A.D.-728 H./1328 A.D.)[39] and Ibn Qayyim (691 H./1292 A.D.-751 H./1356 A.D.)[40] considered the verse as directory.[41] The Federal Shariat Court in Haider Hussain v. Government of Pakistan[42] ruled that all fiscal matters shall be proved by two male witnesses and in the absence of two such male witnesses, by the evidence of one male and two female

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[38] Baillie, 1875, p. 421

[39] *The Encyclopaedia of Islam*, Vol. II, London, 1927, pp. 421-423, *Encyclopaedia of Religion*, edited by James Hastings, Vol. VII, New York, 1914, pp. 571-574

[40] *The Encyclopaedia of Islam*, 1927, Vol. II., pp. 392-393

[41] Hussain, A, 1987, p. 246

[42] Haider Hussain v. Government of Pakistan PLD 1991 FSC 139 at p. 159

witnesses. It is to be noted that the judgement shows strictness in its interpretation of the Islamic law going further than espousing the traditional rule of two male or one male and two female witnesses, it categorically includes female witnesses only in the absence of male witness.

The kind of financial or future obligations are extended, by the jurists, from debt transaction, the only one mentioned in Sura 2 verse 282, to usurpation, embezzlement, inheritance, waqf, lease, gift, compromise, partnership of all types, will, torts, etc.[43] Therefore, the testimony of women is limited in a large number of circumstances by the jurists, though the Qur'an does not exclude their testimony. Article 17 of the Qanun-e-Shahadat restricted itself to debt transaction only.

It is to be noted that many jurists, along with the first four Khalifahs, are of the view that to prove property claims, one witness and the oath of the plaintiff is sufficient. In that case the theory of one man and two women is negated. It is also difficult to understand how a woman could be reduced in her status as witness, when in Islam a woman has full property right. In other words the independent property right of a woman is infringed upon by the need to include a man as a witness whenever some transaction must be entered into. This rule of infringement must have stemmed from the male inferiority complex of economic supervision.

All other general matters except Hadd, Qisas, financial obligation and female matters could be proved by two male or one male and two female witnesses according to Islamic law. Examples of general matters would be marriage, repudiation, emancipation, agency,

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[43] *Al Mughni* by Ibn Qudama, Cairo, NY, Vol. X, pp.130-1 and 133

bequests and the like.[44] There is no Qur'anic basis or Prophetic practice in this respect. This is entirely juristic. This law has not been incorporated in the Qanun-e-Shahadat. This rule has been long incorporated in the marriage registration form of Pakistan and Bangladesh. The prescribed form has clauses for the signature of three witnesses.

6.1.4 Female Matters

According to most of the Hanafi jurists testimony of one witness is sufficient, in matters concerning the privacy of women.[45] Examples of female matters are child birth, puberty, blemishes of woman, etc.[46] There is a reported Hadith in Bukhari that the Prophet separated a couple on the testimony of one female witness for they were foster brothers and sisters, although fosterage is not entirely a female matter.[47]

Child birth, fosterage resulting in divorce and virginity are matters which are prone to affect other wider areas where women have no rights or limited rights. The testimony of a female witness as to whether a child was born alive or dead could adversely affect property rights. Likewise the testimony of a female witness declaring the virginity of a women who is accused by four men of having committed Zina would result in her acquittal.[48] It is mentioned in al Muwatta that if two women testify that a child is born alive s/he becomes a sharer in the property. This may involve

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[44] Baillie, 1875, p. 421
[45] Hedaya, 1791, Vol. II, p. 668
[46] Baillie, 1875, p. 421
[47] Bukhari, 1979, Vol. III, Hadith 828
[48] Aleem, 1955, pp. 148-9

vast properties of gold, silver, live stock, gardens, etc.[49] This law of one woman witness for female matters has not been incorporated in the statute of Pakistan. The case law on this point is that the evidence of single female witnesses shall be admissible in cases relating to birth, virginity and such other matters concerning women as are not usually seen by men. The condition of a female witness does not mean the exclusion of a male witness.[50] It further keeps the venue open for men to be witnesses in female matters, whereas women are totally excluded from giving evidence in most areas. Those areas are defined by the jurists as having male characteristics, notwithstanding that they involve as much the activities of women as men. The view of the jurists about the sufficiency of one woman witness for female matters alone frustrates the rule of minimum number of witnesses in other areas.[51] It may also be noted that female witnesses as expert evidence in Zina cases is often accepted or rejected by the Court on the principle that the expert evidence is not conclusive proof of anything.[52] The case law discussed in this chapter proves this position.

6.1.5 Tawatur : Universal Testimony

Female testimony cannot reach the status of Tawatur (universal testimony) in any offences except female matters. Tawatur consists in the fact of hearing an occurrence related in the same manner by several individuals whose words can be trusted. It seems, that a woman, because of her supposed defective intellect, cannot be

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[49] *Al Muwatta* of Imam Malik translated by Aisha Abdarrahman at Tarjumani and Ya'qub Johnson Cambridge, 1982, p. 339

[50] Haider Hussain v. Government of Pakistan PLD 1991 FSC 139

[51] Hussain, A., 1987, p. 256

[52] see chapter 4.2.2

trusted. The Risala, a text explaining the Maliki school of thought, says that the weight of evidence given by one hundred women is equal to that given by two women only, which in turn, equals that of a man. Such evidence of women can be accepted along with that of one man or accompanied by an oath so that the judgement then is given in favour of the plaintiff, over a case which can be established by a witness and an oath.[53] It seems that it is a prescriptive presumption that the plaintiff will be a man whose interest may be upheld by any number of female witnesses. The fact that in Islam a woman is given the unconditional right to hold property is not taken into account here. In other words, if the woman is the plaintiff her case cannot be proved by her oath and another witness, whether a male or female. She must bring two independent male witnesses, or one male and two women witnesses, to prove her property right. Mahmud Shaltut (1893-1963 A.D.), an Egyptian Islamic scholar and Shaykh of Al-Azhar, believes that, in an environment where women are routinely involved in financial transactions, their testimony should be considered as equal to that of men. He is of the view that in domestic matters where women can be presumed to have superior knowledge, their testimony would likely to be more reliable than that of men.[54]

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[53] *Risala* [Maliki Text],1983, p. 132; see chapter 5.1.1.1

[54] Shaltut, Mahmud, *Aqida wa-Sharia*, Beirut, 1988, p. 240; Zebiri, Kate, 'Shaikh Mahmud Shaltut: Between Tradition and Modernity' in *Journal of Islamic Studies*, 1991, pp. 210-224 at p. 223

6.1.6 The Arguments in Favour of Female Witness Testimony

Sura 2 verse 282 provides with three legal points : 1. the contract of debt must be in writing, 2. the writing must be witnessed by two men or one man and two women and 3. the witnesses must not refuse to come when summoned. For this chapter only point one 1 and 2 are of importance.

The verse is imperative. The question is whether the nature of the verse would render the meaning of the word *must* to 'shall' or to 'may'. In Islamic Jurisprudence oral contract of debt is well established. The claim of a person does not fail only because the contract is only oral and not written. Here it is clear that the word *must* is read as 'may' by the jurists.

There are many instances in Islamic law where cases on property matters can be decided by one witness and an oath. The oath is considered to supplement another witness. But in Islamic law the party to the case is not considered as a proper witness as he is interested. From the jurisprudential point of view, the rule of two men witness is also not adhered by the jurists.[55]

The question that naturally follows from here is why the rule of one man and two women witnesses has to be emphatically followed. It may be noted as mentioned above, that the jurists consider the verse in question, i.e. 2:282 as directory as opposed to mandatory.

By juristic theory a verse of the Qur'an cannot be split to give different status and meaning to each provision in the same verse. It has to be read in its entirety. For that matter the Qur'an has to be read in its entirety, keeping in mind the Prophetic Traditions and

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[55] *Al Muwatta*, 1989, p. 338

the spirit of the reform. Even by the rule of abrogation or reconciliation the provisions of the required number of witnesses and their gender could be considered to have changed by sura 4 verse 6, sura 24 verse 4 and 6-9 and sura 65 verse 2 or that all of them can be reconciled.[56] The sequence of the suras in the Qur'an is not chronological by order of revelation. Most of the jurists consider that sura 2 is number ninety-second sura to be revealed, sura 4 is number ninety-fourth sura to be revealed, sura 65 is number one hundred and fifth sura to be revealed, and sura 24 is number one hundred and tenth sura to be revealed.[57]

Verse 4:6 deals with the release of an orphan's property by the guardian. It does not enjoin any paricular number of witnesses when releasing the property. Verse 65:2 enjoins to take two just witnesses for reconciling with or divorcing one's wife. Verse 24:4 requires four witnesses to prove Zina. None of these verses mention the gender of the witness. The oath in verse 24:6-9 has been given the status of evidence to prove Zina of each spouse against the other. The procedure is known as Li'an.[58] By virtue of verse 24:8-9 a woman has the same status as a man to refute the claim of a man. It should therefore follow that a woman is equal to a man in the status of giving testimony.

If the later revelation abrogates the former then the requirement of two women to one man is abrogated. If all the verses, i.e. 2:282, 4:6, 65:2 and 24:4 and 6-9 are read together, the reconciling points would be a. for all matters two witnesses are recommended, b. for Zina four

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[56] see for abrogation (Naskh) Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Petaling Jaya, 1989, pp. 189-209

[57] Amir-Ali, Hashim, *The Message of the Qur'an presented in the perspective*, Tokyo, 1974, pp. 86-90

[58] see chapter 2.3.2

witnesses are necessary and c. the gender of the witnesses are immaterial, d. only for hypothetical argument if two women are considered equal to a man then at least eight women witnesses should have been allowed to prove Zina and four women witnesses for other Hudud offences. Ata'(d. 114 H./732 A.D.) and Hammad (d.120 H./737 A.D.) are of the view that three men and two women make valid witnesses to testify in Zina cases.[59] According to the Zahiri school of thought even one woman can alone testify for Zina.[60] It may be noted that the proposition of this thesis is that a man and a woman are equal.

The jurists can argue that the cause of verse 2:282 and the other two verses are entirely different. So it can neither be abrogated nor reconciled. The answer to that would be if 2:282 is left as it is then the other verses of the Qur'an are frustrated. Because the property right of a woman is absolute, she can dispose of her property according to her will. Invoking one or two men witnesses in her property disputes is infringement on her absolute property right. Moreover there cannot be two procedures of proof for the same kind of dispute. In property matters a man is allowed to prove his case by an oath and one witness. This provision is not available to a woman. There is inherent injustice in the juristic theory.

It can also be argued that verse 2:282 requires the two woman witnesses so that if one makes a mistake the other may remind her. Then in effect only one woman is giving the correct testimony.[61]

The word إن in the verse means *if* . *If* in verse 2:282 means should be, could be, or might be. The word *if* is more hypothetical than

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[59] Aleem, 1955, p. 146

[60] Ibrahim, 1986, p. 314

[61] Hussain, A., 1987, p. 245

other words in Arabic meaning 'if'. It could be further argued that if the word in the verse *if* is given diminishing effect the controversy would not arise at all.

The finding of the above discussion of the Qur'anic verses is that there cannot be any distinction between a male and a female witness. In whatever manner the law develops witnesses cannot be discriminated on the ground of gender.

The reason for excluding female testimony is not established from the Qur'an. The majority of jurists rely on Hadith to exclude the testimony of women. A Hadith gains strength from the set of authorities cited. It loses its strength due to many reasons, e. g. a set authority is defective, only one set of authority is available without any corroboration from other sources etc. The Prophetic Tradition on which the jurists rely to exclude the woman from Hadd and Qisas offences are :

"Isn't the witness of a woman equal to half that of a man?" The women said, "yes" He said, "This is because of the deficiency of the woman's mind."[62]

This is an Ahad Hadith, i.e. an isolated one,[63] meaning it may have been reported by one set of authority. This Hadith is considered as false Hadith, because it describes what is impossible of occurrence and is not acceptable to human reason. It is contrary to the Qur'an and to historical facts.[64] If a woman is defective in reason then her power to dispose of her property should have been curtailed by the

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[62]Bukhari, 1979, Vol. III, p. 502

[63]Hussain, A., 1987, p. 224; see chapter 2.1.1

[64]for details see, Hussain, A., 1987, pp. 221-241

Qur'an or the Hadith. In Islamic law a woman has exclusive property right. Hanafi School allows a woman to be a judge.[65]

The exclusion of a woman as a witness on which the jurists rely is not proved from the Prophetic Tradition. Rather there are Hadith showing that Prophet relied on one woman witness even in Hadd matter.[66]

6.1.7 Reasons for Excluding Female Witness Testimony

The reason for excluding a woman's testimony could be her seclusion. It is considered by the classical jurists that it is not suitable for a woman to appear in public, to have contacts with men and to talk to them on equal terms.[67] If she is made a witness she will appear in public frequently. This kind of seclusion is bound to make a person unaware of the practicality of outside world. Most of the classical jurists do not take into account that the Prophet's wives and other women used to participate in combats not only as nurses but also physically in the war.[68] The Prophet's daughter gave public lectures.[69] His wife Ayesha Siddiqua used to be regularly visited by people to gain knowledge. Ayesha Siddiqua is considered a scholar[70] and the source of more than one third of the Hadith. There are many narrations from Ayesha Siddiqua in which there is no co-narrator, yet no one denied their truth.[71] She had even led a war after the death of the Prophet. Later also women preachers, scholars and

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[65] *Hedaya*, Vol. II, p. 633

[66] Hussain, A., 1987, p. 235 relying on Abu Daud, Hadith, 974

[67] Hussain, A., 1987, p. 230

[68] Siddque, K., 1986, pp. 60-66; Nadwi, Allama Syed Sulaiman, *Heroic Deeds of Muslim Women*, 1st ed., Lahore, 1961 re 1976, p. 12

[69] Ali, Saiyid Ameer 'Islamic Culture.....' 1927 at p. 335

[70] Siddiqi, MZ, 1961, pp. 14 and 31-3

[71] Rahman, Afzalur, *Role of Muslim Women in Society*, London, 1986, p. 270

saints were given significant recognition, e.g. Ibn Khalliqan (he was Qadi al Quddat of Syria in 677 H./1278 A.D.)[72] was the student of Zaynab bint al Shari (d. 615 H./1219 A.D.), a famous woman scholar.[73] There are many more instances which shows that the women were considered equal to men in early Islam.[74]

Seclusion of women, as mentioned earlier, is the norm in later Islam. It reached such importance that the classical jurists extracted special laws dealing with secluded women. In Shafei school, in the case of a veiled woman, a witness cannot rely upon her voice to prove her identity, unless he could recognise her figure, and knows her name and origin.[75] It is lawful in Hanafi school to look at the face of a woman for the purpose of taking up testimony with regard to her.[76] A retired or secluded women may lawfully call a witness to receive her testimony, and although she could go out for necessary purposes, such as the bath and the like, she is still to be accounted a retired woman, provided she does not mingle with men.[77] During the British rule in India the women were excused from appearing in Court who according to the custom of the country ought not to appear.[78] It seems, because of the importance accorded to veiling, most probably women witnesses were restricted in a large number of areas. Regarding female matters it was impossible and impractical. For that reason the woman is allowed to be a solitary witness in those matters only.

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[72]*The Encyclopaedia of Islam*, New Edition, 1971, Vol. III, pp. 832-833

[73]Esposito, 'Women's Rights.....' 1975 p. 105

[74]see for details, Siddique, K., 1986.

[75]*Minhadj at Talibin* (with Arabic Text), 1884, Vol. III, p. 412; *Minhaj et Talibin*, 1914, p. 519

[76]Baillie, 1875, pp. 422-3

[77]Baillie, 1875, p. 434

[78]Cowell, 1872, p. 269

The jurists in Turkey seems to uphold the view that since in modern days women are no more secluded and prove to have same or better intellect than men in many cases she cannot be lowered in her capacity as a witness.[79]

The reason for excluding the woman witness totally from Hudud offences is, the jurists consider that it is not within the dignity of women to look at acts like Zina or Zina bil jabr. This can not be a good reason because observing other Hudud offences like drinking or theft would not affect her dignity accorded by the society to her. The Hudud offences do not take place in the public. A woman who spends most of her time in the confinement of domestic work is more apt to notice these offences than a man. The only plausible reason is that the punishment for these offences are meant to be deterrent rather than punitive. Therefore women as a class need to be kept out of the area of Hadd offence.

Psychological research in the west on the effects of gender differences on eye witness ability has produced results that are equivocal. Some studies of gender differences have shown that females perform better than males, while others have shown that males perform better than females.[80] Still others indicate no differences in the accuracy or completeness of women and men.[81]

Sally LLyod-Bostock and Brian R. Clifford claim that gender effects in verbal description of facial identification are observed to be in

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[79] Karaman, Hayreddin, 'Testimony and Veiling of Woman and her Particiapting in Public Services' pp. 284-291 at p. 287; and Ali Bulac, 'Testimony of Woman in the Context of "Maqasi al-Shariah" (Purposes of Islamic Law)' pp. 292-309 at pp. 303-307 in *Islami Arastirmalar Journal of Islamic Research*, October 1991, Vol. 5, No. 4

[80] Loftus, Elizabeth F., *Eye witness Testimony* Cambridge et al, 1979, p. 157

[81] Lloyd-Bostock, Sally M.A. and R. Clifford (ed.), *Evaluating Witness Evidence Recent Psychological Research and New Perspectives*, Chichester et al 1983 re 1985, p. 109

parallel, at least partially, to the eye witness literature. The authors put forward their own research suggesting that, other things being equal, females will make the better witnesses. But the authors point out that other things are rarely equal and this general effect may need to be qualified in terms of consistency v. quantity, violent v. non violent situations of witnessing, and the nature of the information to be recalled, as the nature of the information has had to be modified in eye witness research.[82]

According to Elizabeth F. Loftus and Gisli H. Gudjonsson, interest may play a crucial role in memory. Females have been found to be more accurate in their memory recall than males with regard to 'female-oriented' details, whereas the reverse is true concerning 'male oriented' details.[83] Therefore gender may significantly influence the type of details that are remembered from an incident.[84] One consequence of this is that people's attitudes can be more readily influenced when they have little information about the subject area or regard it as trivial and unimportant.[85]

According to Hugo Munsterberg, some experiments suggest that the memory of the two sexes is not essentially different, while the majority of the tests seems to speak for very considerable difference. He says, experiments with school children seem to show that girls have a better memory than boys as far as omissions are concerned. They forget less but they have a worse memory than the boys as far as correctness is concerned. The girls falsify more unintentionally.[86] For adults his view is that most of women

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[82]Lloyd-Bostock and Clifford, 1983, p. 213
[83]Loftus, 1979, p. 158; Gudjonsson, 1992, p. 86
[84]Gudjonsson, 1992, p. 86
[85]Gudjonsson, 1992, p. 143
[86]Munsterberg, 1927, p. 54

frequently experience the uncanny feeling of remembrance and recognition of past experience, although this is only an associated sensation resulting from fatigue and excitement. It is without the slightest objective basis of the past. He points out that this happens rarely with men. He warns those who believe that the feeling of certainty in recollection secures objective truth.[87]

It is to be mentioned that no such studies on the eye witness ability on gender seems to have been carried out in Pakistan and Bangladesh. It is difficult to say whether the result of such research in Pakistan and Bangladesh would be the same as in the western countries. Whether social and religious upbringing will influence the mind of the persons to be tested for ability is also important if research were to be carried out. If the result were the same as in the western countries, then should one not then pay heed to Mahmud Shaltut's observation that in female or domestic affairs womens' testimony should be given higher priority? In the context of 'female-oriented' details one must remember that it could even be the normal female reaction to a street fight to call the police rather than trying to get involved in the fight with the hope of restraining the parties, as Loftus showed a man would do.[88] In the present day Muslim countries, if a woman's testimony had to be restrained in any matters this observation would be significantly important. Particularly in Pakistan within the limit of Hadd and Tazir offences the Courts most probably need to redefine those offences in terms of 'female oriented' matters. It seems the present day Pakistan situation would not satisfy the criteria.

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[87]Munsterberg, 1927, pp. 57-58

[88]Loftus, 1979, p. 158

6.2 Testimony of Women in Pakistan and Bangladesh

In Pakistan the introduction of article 17 of the Qanun-e-Shahadat has taken a woman's right partially, and Hudud law has taken away the woman's fundamental right, to protect herself in front of a Court. By the statutory rules of Hudud law, a woman who suffers injury by Zina bil jabr cannot be a witness, whereas even a child is allowed in Islamic law to be a witness against the injuries s/he receives.[89] By analogy if a female child suffers injury due to Zina bil jabr she can be a witness but a grown up female has to bring four male witnesses to prove Zina bil jabr committed on her because the Courts often term a Zina bil jabr case as Zina.

In Pakistan a report was brought out by the Pakistan Commission on the Status of Women in 1989. It is pointed out in that report that the status of women accorded by the Hudud Ordinance and article 17 of the Qanun-e-Shahadat is not in accordance with the Qur'an and the Prophetic Traditions. It is recommended that the rules should bre amended to bring equality between men and women.[90] Until now no step has been taken to implement the recommendations set forth by the Commission.

In civil and murder cases the position of woman is yet same to a man in Pakistan. The introduction of Qisas and Diyat law in 1992 have not shouldered the women with more disparities relating to testimony. It is yet to be seen how the Courts interpret the provision relating to witness testimony.[91] The discrepancy in theory is more obvious in

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[89] see chapter 3.1.3.1

[90] *Report of the Pakistan Commission on the Status of Women*, pp. 147 and 150

[91] see the interpretations made by the Courts in Azad Jammu and Kashmir cited in chapter 2.3.2; it is not binding on the Courts in Pakistan.

Hudud cases of Zina and Zina bil jabr. Other cases of Hudud, e.g. theft, drinking, etc. do not come to the Courts for decision in a large scale and if they do in most cases a woman is not involved and therefore the conflict regarding female witness testimony is not tested.

6.2.1 Proof in Civil and Murder Cases

Article 17 of the Qanun-e-Shahadat discriminates against a woman witness in financial matters. It is stated in Fida Husain v. Naseem Akhtar[92] that in Pakistan the woman need not face discrimination at least in civil matters. It was held that in Islamic law no particular number of witnesses are necessary to prove a case of civil nature. It was observed as *obiter dicta* that the Prophet has decided cases :

on the testimony of a woman plaintiff,

on the testimony of one female witness,

on evidence produced by both the parties,

on the evidence of a witness and an oath of the plaintiff,

on the oath of the defendant,

on the evidence of two or more witnesses and on the oath of the defendant.

This is a High Court observation of 1977. This decision is previous to the introduction of Qanun-e-Shahadat in 1984. The statutory position therefore is that a woman faces discrimination in civil matters in Pakistan until and unless the Supreme Court of Pakistan upholds this observation. It is possible to give a liberal interpretation of article 17 of the Qanun-e-Shahadat, which may in turn lead to the amendment of this article.

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[92]Fida Husain v. Naseem Akhtar PLD 1977 Lahore 328 at p. 334; Hussain A., 1987, p. 271

In Pakistan the testimony of a woman witness is admissible in murder cases. The Qisas and Diyat law of 1992 has yet to be tested. The Courts were applying Islamic law based on the Constitution of Pakistan long before the Qisas and Diyat law was passed. But the woman until now retained her position as valid witness. The Court believes or disbelieves a woman witness like any other male witness although not always with an objective mind.

Ghulam Sikandar v. Mamaraz Khan[93] was a Supreme Court case showing a bias against the only female witness of this case. A man and his relative were murdered by his son in law. This was proved beyond reasonable doubt by the prosecution witnesses. The sole eye witness to the murder was the injured wife. This case is interesting in the sense that the accused-son in law was punished with 2 years rigorous imprisonment because the Court could not find any motive on the part of the accused-son in law to commit murder, although it appears from reading the case that the accused-son in law had grievance against his father in law for not sending his wife to him, and as the accused-son in law and his family suspected the wife of the deceased, i.e. his mother in law to have illicit relationship with the other deceased! The Court simply relied on the statement of the accused-son in law regarding the woman's, i.e. his mother in laws, relationship with the other deceased. The Court was surprised to see that the deceased, i.e. the father in law had been aiding the woman witness, his wife, instead of protecting the family honour. The Court did not think that the accused-son in law's wife's residing in her fathers house was a motive. All the Court did was to try the shake the integrity of the deceased's wife and find her venom against the

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[93]Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11

accused-son in law. The Court also did not at all take into consideration that the witness is a village woman. She may have made mistakes while deposing as a witness.

In the case of Punhal Shah v. State[94] the prosecution story was based on three women witnesses to the murder whom the court believed to be true witnesses. They were the mother, sister and the maid servant. None others were in a position to narrate the occurrence in its entirety due to the sanctity and seclusion attached to the haveli (palace) of the gaddinashin (an inherited religious position of a person) and the position enjoyed by the eye witnesses. Whatever happened outside it could not have been witnessed by the woman and whatever happened inside the haveli could not have been witnessed by the faqirs (pious people) and their families outside. For this reason the Court put reliance on the three women witnesses.

In another Supreme Court case, Mst Zainab Bibi v. Mushtaq,[95] the mother was the only eye witness to the murder of her son aged eighteen/nineteen years. Other witnesses gathered on her cries. The High Court felt that she and another witness made improvements in their statements and therefore their testimony required independent corroboration. The blood stained dress of the murderer, the mother's own blood stained dress and the post mortem examination report were accepted both by the High Court and the Supreme Court as corroboration to convict the murderer. This case is both an example of solitary witness testimony and corroboration by means of other evidence rather than corroborating by witness testimony. Even had the mother been completely believed by the

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[94]Punhal Shah v. State PLD 1984 SC 22

[95]Mst Zainab Bibi v. Mushtaq PLD 1985 SC 287

upper Courts corroboration would have been insisted upon as is discussed in chapter 5.

6.2.2 Proof in Illicit Relations

Illicit relations could be described as Zina, Zina bil Jabr, adultery and rape, and in such cases this chapter will discuss how women often suffer discrimination in giving testimony.

According to article 4 of the Zina Ordinance[96] a man and a woman are said to commit Zina if they wilfully have sexual intercourse without being validly married to each other.

Adultery according to section 497 of the Penal Code[97] is sexual intercourse of a man with a married woman without the consent or connivance of the husband of the woman. The woman is not considered an abettor.

In Zina the punishment to be awarded depends on the marital status of the parties. The marital status of the man is immaterial in adultery.

In Zina the husbands consent is immaterial. If the husband of the woman gave consent it would not amount to adultery.

In Zina the women is an abettor The woman is not an abettor in adultery.

In Pakistan the provision of adultery in section 497, cohabitation caused by a man deceitfully inducing a belief of a lawful marriage in section 493 and enticing or taking away or detaining with criminal intent a married woman in section 498 of the Penal Code are repealed. Sections 493 and 498 are incorporated in the Zina

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[96]Ordinance VII of 1979

[97]Act XLV of 1860

Ordinance as article 15 and 16 respectively. It is to be noted that a person will be punished with rigorous imprisonment that may extend up to twenty five years and a fine, if he cohabits with a woman by deceiving her to believe that he is her husband. This provision should be treated within the definition of Zina bil jabr but instead the legislators provided with a Tazir punishment beforehand as if knowing that a woman can prove this kind of cases by at least four male witnesses. Therefore the only conclusion would be that the legislators knowingly avoided Hadd punishment.

According to article 6 of the Zina Ordinance a person is said to commit Zina bil jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances :

against the will of the victim;

without the consent of the victim;

with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or hurt; or

with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

The article ends with an explanation.

According to section 375 of the Penal Code a man is said to commit "rape" who, with the exception of his own wife of thirteen years or above, has sexual intercourse under five descriptive circumstances. They are :

First ____ Against her will

Second ____ Without her consent

Thirdly_____ With her consent, when her consent has been obtained by putting her in fear of death, or hurt.

Fourthly_____ With her consent, when the man knows that he is not her husband, And that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly_____ With or without her consent, when she is under fourteen years of age.

The section ends with an explanation and the exception regarding wife as already mentioned.

Pakistan has repealed section 375 and 376 of the Penal Code.

It is not rape when it is committed with the consent of the woman of more than fourteen years, whether she is married or unmarried. The consent of the woman of fourteen years would probably change the offence of Zina bil jabr to Zina. The consent of a child should be immaterial. In the Hanafi thought of Islamic law it is presumed that a woman reaches her puberty from any time between the age of nine to seventeen. The age of fifteen is considered reasonable by the two disciples of Abu Hanifa.[98]. It seems fourteen years for a girl who has not reached puberty may be a marginal case for considering her consent as valid in Islamic law. It probably would depend on the Judge to decide each case. The age of maturity in Pakistan and Bangladesh according to the Majority Act, 1875 is eighteen years. Moreover if the girl is a ward her maturity would be considered from the age of twenty one. How consent below the statutory requirement would not render such act as rape in Bangladesh is unclear.

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[98] *Hedaya*, 1791, Vol. III, p. 483

Marital rape is not recognised by section 375 of the Penal Code if the wife is more than thirteen years of age in Bangladesh. But section 376 of the Penal Code provides for punishment of a husband who rapes his wife of more than twelve years. If this two sections are read together it will literally mean that marital rape is recognised until the wife reaches thirteen years and the husband could only be punished until she is twelve years old. There is no doubt that it could not have been the legislators intention to keep a gap of one year. There must be some drafting flaws which still exists in the statute. It is yet to be seen how the draftsman would amend if once it is noticed by them. In Pakistan, it seems that Zina bil jabr is not recognised with ones wife, of whatever age she might be. Her consent is immaterial under both the Penal Code if she is above thirteen years of age in Bangladesh, and the Zina Ordinance of whatever age she might be in Pakistan.[99] The Majority Act, 1875 does not apply to family matters of marriage, divorce, etc. The age limit in the Penal Code does not take into consideration the fact that child marriage below the age of sixteen years in Pakistan and eighteen years in Bangladesh for a girl is a punishable offence under the Child Marriage Restraint Act, 1929.[100] The consent of a minor girl to marriage or sexual relationship is immaterial.[101] Yet child marriage

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[99] The position is virtually same in India as in Bangladesh. see for a comparison between Indian and USA law on marital rape, Bohra, Neena, 'Marital rape exemption and equal protection clause' in *The Lawyers* 20 January, 1992, pp. 16-20

[100] Section 3 of the Child Marriage Restraint Act, 1929 amended by, section 13 of the Muslim Family Laws Ordinance, 1961 in Pakistan, and section 2 of the Child Marriage Restraint (Amendment) Ordinance, 1984, [Ordinance No. XXXVIII of 1984] in Bangladesh.

[101] Ghulam Ahmad v. The State 1981 P Cr. L J 173 at p. 176 [Lahore]

is prevalent.[102] It might have seemed appropriate for the legislators in Pakistan to repeal the protective law towards the child wife as no case is filed under that section. Had a child wife filed a case under this section it would simply mean in a society like Pakistan and Bangladesh the end of her married life forever. No woman would have taken refuge under that law let alone a child wife. On the other hand it can only be noted that Zina Ordinance is meant for the protection of men only who are free to take revenge against the unprotected women as appears from the case law in Pakistan, and even the last resort for a child wife is snatched away.

By statute rape can only be committed by a man whereas Zina bil jabr can be committed by both man and woman.

The Zina Ordinance in Pakistan requires four male eye witnesses to prove Zina and Zina bil jabr. Adultery and rape could be proved in Bangladesh by any number of witnesses, male or female following section 134 of the Evidence Act.

The laws relating to Zina and Zina bil jabr have made a woman in Pakistan more liable to prove a case. The burden of proof is on her if she asserts that Zina bil jabr is committed on her. In such situation she cannot be a valid witness for Hadd punishment of the accused but she may not only be considered as an accused but her character may also be raped.

In this respect the mention of the recommendation made by the Law Commission of India would be of much interest. It was suggested that a mature woman, who compels or seduces a boy under sixteen years of age to sexual intercourse, should be just as severely punishable as

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[102]Singh, Indu Prakash, *Women's oppression, men responsible*, Delhi, 1988 p. 169, The observation made in this book relates to India but it is true for Pakistan and Bangladesh also.

a man in the converse case. The proposition of the law commission did not define a mature woman. Moreover, the commission recommends that if the man is led to believe, and he in good faith believes, that the girl is over sixteen years, he should be given defence of *bonafide* mistake as to age. The law commission also recommends the reduction of punishment in each case.[103] It is interesting to note that compared with Pakistan and Bangladesh the women in India do not, and would not if the recommendations were realised, fare better than their fellow sisters in the Indian subcontinent.

The Hudud law in Pakistan has totally excluded women from proving a case in which she might have suffered the most. On top of that the derogatory requirement of article 151(4) of the Qanun-e-Shahadat and section 155(4) of the Evidence Act has ensured her lower status as a witness. According to article 151(4) and section 155(4)[104] if a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Before going into the defects of section 155(4) of the Evidence Act, it may be pointed out that the corresponding article 151(4) in the Qanun-e-Shahadat of 1984 could not have been of any use in deciding the cases in Pakistan as sections 375 and 376 in the Penal Code were repealed in 1979. It may however be noted from the case law discussed in this chapter that the judges seem to be much influenced by this article whether or not they expressly mention it.

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[103] *Law Commission of India 42 Report, Indian Penal Code*, Ministry of Law and Justice, Government of India, June 1971, pp. 276-279

[104] Section 155(4) of the Evidence Act 1950 (Act 56) has been repealed in Malaysia by Act A729 in 1989. Moreover section 146A has been incorporated expressly prohibiting any question to the complainant on her sexual activity with certain exceptions. It may be mentioned that Malaysia in essence follows the rules of The Evidence Act, 1872.

This is obvious when the victim of a Zina bil jabr offence is considered as an abettor in the crime. This will be clear from the case law discussed below showing how a crime of Zina bil jabr is changed to Zina.

There is an initial presumption in section 155(4) that in a prosecution for rape that the prosecutrix is generally of immoral character. This should equally be applicable to the accused also. Section 53[105] of the Evidence Act weighs the balance in favour of the accused. It is stated in this section that the accused is of good character is relevant. The following section, i.e. section 54[106] states that the bad character of the accused is irrelevant unless it is shown that he is of good character.[107] The prosecutrix in a rape case is not considered by the statute as an accomplice though she is considered in practice in that manner. Therefore the victim of a rape case is left facing accusations in cross examination as a woman of bad character and treated in practice as an accomplice.[108] This is repressive to put the victim of a crime on the dock to weigh the balance in favour of the accused. A woman in societies like Pakistan and Bangladesh do not only lose honour because of her association with the crime but also from the process of law by virtue of section 155(4) or article 151(4).

If it is considered later on in Pakistan as a drafting mistake, and the words rape and ravish are changed to Zina bil jabr in Qanun-e-Shahadat, a woman would suffer even more than in Bangladesh. In

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[105] corresponding article 67, Qanun-e-Shahadat

[106] corresponding article 68, Qanun-e-Shahadat

[107] Raees Khan v. The State 1991 P Cr. L J 617 at p. 621 [Lahore]; Abdul Aziz v. The State 33 DLR 1981 HD 402 at p. 405

[108] Deshpande, Justice V. S., *Women and the New Law*, 1st ed., Chandigarh, 1984, pp. 32-6

addition to what is mentioned above she will have to procure four male witnesses to prove her painful situation. If it is assumed that article 151(4) of Qanun-e-Shahadat is deleted still there is a risk that female witnesses or prosecutrix can always be ridiculed and harassed by asking indecent and scandalous questions unless the trial judge prevents the parties or the lawyers from putting such question.[109]

In Bangladesh the woman's position is inferior to that of a woman in Pakistan in respect of complaint in a case of adultery. By section 199 of the Code of Criminal Procedure, 1898, the husband is the only aggrieved person to bring a complaint against the accused. In the absence of the husband, her guardian, or someone else on the husband's behalf if he is disabled, will be recognised as competent to complain against the accused. The Court will not take cognisance of the offence otherwise. There is no right for a wife to prosecute the husband for adultery.[110] In a Zina case the woman can bring a complaint against the accused. She does not have to wait for her husband. Pakistan has not repealed section 199 of the Code of Criminal Procedure,1898, although it has repealed adultery. Section 199 of the Code of Criminal Procedure,1898, is both unIslamic and unconstitutional. In Islam a woman does not change her status intellectually or economically on her marriage.

Both sections 155(4) of the Evidence Act and 199 of the Code of Criminal Procedure,1898 is unconstitutional. They are opposed to article 27 of the Bangladesh Constitution which gives equal rights to

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[109] Muhammad Amir Khan v. The State 1992 P Cr. L J 1944 at p. 1949 [FSC]; also see chapter 6.2.2

[110] Patel,Thrifty D., 'Law Regarding Adultery and Women's Equality' in *Women in India Equality, Social Justice and Development* edited by Leelamma Devasia and V. V. Devasia, New Delhi, 1990, pp. 162-177 at p. 171

men and women, article 26 which declares laws inconsistent with fundamental rights to be void, and article 31 which ensures right to protection of law.

If article 151(4) of Qanun-e-Shahadat is amended later it will also be unconstitutional by the standard of the Pakistan Constitution. It will be unconstitutional by article 25 which gives equal right before law and article 8 which makes laws inconsistent with fundamental rights to be void. As adultery in section 497 of the Penal Code is repealed section 199 in the Code of Criminal Procedure,1898, remains to be repealed in time.

The assertion made by Charles Kennedy that implementation of Islamic laws under Pakistan's Islamisation programme has not had a significantly adverse impact on the rights of women[111] is belied by the arguments and evidence presented in this chapter.[112] Whether the women are physically made to go through the punishment is not in question. The case law indicates that in sexually assault cases the judges have found that the women themselves have contributed to the performance of the crime. A woman who is accused of being no longer chaste has lost both psychic value and the social value. The existing standards of deciding the cases are too vague and open textured. It requires amendment or interpretation that has to be nurtured by taking into account the whole gamut of the consequences of law on the accused, the victim and the society.

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[111] Kennedy, Charles H., 'Islamic Legal Reform and the Status of Women in Pakistan' in *Journal of Islamic Studies*, 1991, Vol. 2, pp. 45-55 at p. 54; Kennedy, Charles H., 'Islamization in Pakistan Implementation of Hudood Ordinances' in *Asian Survey*, March, 1988, Vol. XXVIII, No. 3, pp. 307-316 at p. 312

[112] see Jahangir, 1990, arguing against the observation of Charles Kennedy, pp. 137-140

6.2.2.1 Proof in Illicit relations in Practice

Although by the Hudud Ordinance in Pakistan a woman cannot be a witness to Hudud offences, in practice the section is given a wider meaning. The challenge posed by Rasida Patel v. Federation of Pakistan[113] against the Hudud Ordinances theoretically has not improved the position of women, but it has elevated the position of women to a certain extent, by clarifying that a single woman witness is allowed in Tazir cases. The testimony of a woman witness is accepted to change the charge of Hadd to Tazir at the first place. It would be impractical to reject cases outright. In the next step the position of a woman is lowered by transforming the Zina bil jabr cases into Zina cases, i.e. a case transferred from article 10(3) to 10 (2) of the Zina Ordinance of 1979. A failure to establish a charge of Zina bil jabr is not interpreted as a confession of adultery[114] but it is interpreted as a confession of Zina. The victim's version is usually not believed if she is a young woman. In Bangladesh the established rule of practice is to insist on corroboration of the statement of the prosecutrix.[115] The rule does not jeopardise the position of women as a witness nor does it convict her with a charge she has not framed. The position of a woman in a rape case is better in Bangladesh compared to Pakistan, except that she is cross examined under section 155(4) of the Evidence Act as discussed above.

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[113] Rashida Patel v. Federation of Pakistan PLD 1989 FSC 95

[114] Saigol, Yasmin, 'Appraisal of Criminal Laws Concerning Women' in *All Pakistan Legal Decisions*, April, 1993, Vol. 45, No. 4, pp. 36-41 at p. 41

[115] Saidur Rahman Neuton and others v. State 45 DLR 1993 AD 66 at pp. 68-9 relied on Muhammad Abdul Khaleque and others v. State 12 DLR (SC) 165, Momtaz Ahmed Khan v. State 19 DLR (SC) 259 and Rameshwar v. State of Rajasthan 1952 Supreme Court Reports 377; Zainul Abedin and others v. The State BLD 1983 HCD 108 at pp. 111-3

In Pakistan it is laid down that conviction cannot be based on the uncorroborated testimony of the prosecutrix. It would be dangerous to do so. Theoretically the Court claims that the victim of rape is not an accomplice. There is no impediment to convict the accused on her solitary statement. Corroboration of her statement is not a statutory requirement. It is only a rule of prudence. Whether the rule of prudence shall be adopted or not, will depend on the circumstances of each case.[116] The evaluation and assessment of evidence is to find out the truth in the statement of the woman.[117]

In the case of Sultan Maqsood v State[118] the prosecution case was supported by the depositions of the two women, the prosecutrix and her mother, and the medical evidence. The prosecutrix, an unmarried girl of about seventeen years, and her mother were plucking berries out in the hills when the appellant, accompanied by another person, got hold of her, extending threats to her mother, and committed Zina on her twice each. Her mother came home and waited for her son, the only other male member of the family, to return from work so he could lodge the first information report, as her husband was too old and weak to do anything. All the Courts accepted the testimony of the prosecutrix as imposing confidence, in so far as the implication of the appellant was concerned.

The lower Courts acquitted the accused under section 10(3), i.e. Zina bil jabr and convicted him under section 10(2), i.e. Zina of the Zina Ordinance. The Supreme Court observed that in this case although the conviction could be under section 10(2) of the Zina Ordinance, on benefit of doubt that the prosecutrix might be a consenting party,

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[116] Sher Ali v. The State 1985 P Cr. L J 349 at p. 456 [Lahore]

[117] Muhammad Ilyas v. The State 1980 P Cr. L J [SC (Azad J&K)]

[118] Sultan Maqsood v. State PLD 1985 SC 305

the other equal reasonable possibility that she might not have been a consenting party cannot be ignored. It further observed that if that were so, nothing has been said in either of the two judgements of the lower Courts as to how the victim of the crime is to be compensated. Since there was no appeal on behalf of the prosecutrix nor had the state appealed in so far as the acquittal under section 10(3) is concerned, the Court could not accordingly enhance the sentence of a fine so as to award adequate compensation to the prosecutrix. The only alternative the Court considered was to reduce the sentence of imprisonment and increase the sentence of fine.

By mentioning this the Court maintained the conviction of Zina under section 10(2) of the Zina Ordinance, reduced the sentence already undergone which would be about four years, and enhanced the fine to Rs. 5000, in default whereof he shall suffer one year rigorous imprisonment, otherwise he is set free. It may be noted that the trial Court convicted the accused for 7 years rigorous imprisonment, a whipping numbering 15 strokes, and fine of Rs. 2000. The Federal Shariat Court further reduced the sentence to 5 years rigorous imprisonment, a whipping numbering 10 strokes, and fine of Rs. 1000. The Supreme Court has further reduced the sentence to only 4 years rigorous imprisonment and one year more if the accused chose not to pay at all the compensation to the girl.

Further it may be noted that if the benefit of doubt was extended to the accused, why could the same not have been extended to the victim by applying section 10(3), i.e. Zina bil jabr, as she, in law, is put on a par with the accused. The Courts contention that she did not object to the acquittal of the accused under section 10(3) is not tenable because the decision by itself was enough for a complainant to keep her distance from a legal system where the victim is declared

an accused. If 10(3) is considered to be a graver offence on the part of the accused is not 10(2) a far graver offence when she was a victim of the situation? If the Court can change the offence from 10(3) to 10(2) without any prayer from the defence, as mentioned above, then it should be able to do the reverse as well. It is no plea that the victim did not ask for the same.

In a case of Bahadur Shah v. The State[119] the victim had charged the accused forthwith for Zina bil jabr. Her statement was fully corroborated and supported by the medical evidence and other oral evidence. The Court went further to see whether it was a case of Zina or Zina bil jabr. To justify this the Court put emphasis on the statement of the lady doctor and the victim. The lady doctor stated that the victim had been freshly raped and was not used to sexual intercourse, but that she did not observe any injury on other parts of her body. The victim, during the course of her cross examination, admitted that if it was a case of forcible rape by one person, she was bound to sustain injuries like bruises, contusions, scratches or abrasions on different parts of her body as she was supposed to put up resistance. The statement of the lady doctor and the rest of the facts and circumstances in which the occurrence had taken place led the Court to believe that whatever the reasons and circumstances, the victim had not put real resistance and it appeared that the act was done with her consent. So it was a case of Zina and not Zina bil jabr.

It may be noted that in the same case, the sister of the victim admitted a number of suggestions put to her during her cross examination and the accused was able to get some concessions from

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[119] Bahadur Shah v. The State PLD 1987 FSC 11

her in his favour. The Court stated that the concessions so given would be of no material help to him in this case. The reason given was the manner in which she answered all the questions put to her in the affirmative, which showed that she was a simple, illiterate and rustic villager and was unable to properly understand the questions. It is not understandable, then, how the Court considered another illiterate unmarried village woman to have acquired all the knowledge of rape and its consequences only because she happened to be the victim.

Khushi Muhammad v. The State[120] is a case of Zina bil jabr. It was considered by the Federal Shariat Court to be a case of Zina, as consent was present. The Supreme Court did not reject this observation but, regarding the value of the testimony of the prosecutrix, it stated that except for an element of a possible consent there was no inherent infirmity in the deposition of the victim. It may be noted that the medical evidence was positive with a further finding that the victim was used to sexual intercourse. It is not clear whether this by itself will raise the presumption of consent in this particular case.

In Bashir v. The State,[121] Zina bil jabr was converted to a case of Zina by the Federal Shariat Court. The reason is that the victim was taken to various places by the appellant but she did not raise any alarm, otherwise it would not have been possible for the appellant and the acquitted co-accused to have taken her from place to place and kept her in their custody for so many days. The conduct of the victim suggested that she was a willing party to the affairs. It was a

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[120] Khushi Muhammad v. The State PLD 1986 SC 12

[121] Bashir v. The State PLD 1986 FSC 196

case of elopement and subsequent offence of Zina, committed by appellant with the consent of the woman. The Court also tried to show that from the cross examination of the woman it transpired that there was a love affair between her and the appellant. She had voluntarily left her house and gone to the appellant to marry him. Replies to a suggestion made to her are reproduced in the judgement to prove this.

It is difficult to understand why the Court reproduced the part of the reply as all the answers are in the negative which in no way supports the case of a love affair. It is also disturbing that the conduct of the victim is considered as a case of consent. There could have been an element of adventure, or deceit, or effects of a drug having a tranquillising effect or anything else. The Court did not take into account any of these elements before passing its judgement.

In Muhammad Sharif v. The State,[122] a woman was deceitfully taken from the house in the presence of her brother by her brother in law and was in his custody for more than one year. The Court could not believe that she did not have consent in the act and therefore converted a case of Zina bil jabr to a case of Zina. She claimed to have an illegitimate child. As this statement was not accompanied by a properly made explanation, the Court felt that no presumption could be raised in her favour as she kept silent for such a long time on account of pregnancy, she was unable to face her relatives and had resigned herself to the fate of being a spoiled woman.

What is unbelievable is how the Courts, which do not allow a woman to be a witness for a Hadd offence due to her defective intellect,

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[122]Muhammad Sharif v. The State PLD 1985 SC 319

would expect her to make statements with proper explanations. Could this be a reason to conclude that the reasonable possibility is that she left with the accused on her own free will and she remained with him for such a long time without any coercion?

In the above mentioned last three cases the Court does not look at the issue as to whether these women were battered women. Battered women is a person who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without concern for her rights.[123]

In Sohail Iqbal v. the State[124] a woman of twenty years of age was subject to Zina bil jabr. Medical evidence proved that she had suffered multiple injuries and also that she was a virgin before this act. She raised the alarm and her mother came to her rescue. The Court however observed that the mother was not a witness of any part of the occurrence but somehow she had found out that her daughter had lost her virginity at the hands of the appellant. She could have either herself given her some thrashing which might have caused the braises as well as the contusions, or these might have been faked to make out a case of Zina bil jabr. In these circumstances the benefit of doubt goes to the appellant, at least to the extent that it cannot be held to be a case of Zina bil jabr. However the offence of Zina under section 10(2) is established beyond doubt. A sentence of a fine as compensation to the victim, apart from

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[123]Breyer, Hugh, 'The Battered Woman Syndrome and the Admissibility of Expert Testimony' *Criminal Law Bulletin*, 1992 Vol. 28, No. 2, pp. 99-115 at p. 99

[124]Sohail Iqbal v. The State PLD 1983 FSC 514

imprisonment and whipping, is set aside as she might have been a willing party.

It may be noted that fifteen abrasions and two contusions were found on her body. This is a case from an Islamic Court. One wonders if wrong interpretations of Islamic law is allowed to continue on the whims of the judges whether Islamic law will at all develop as enshrined in the Constitution of Pakistan.

The Federal Shariat Court is perhaps more ready to accept an attempt to Zina bil jabr than the offence itself. In the case of Muhammad Aslam v. The State[125] the eye witness to the attempt of Zina bil jabr is the prosecutrix and her mother. On raising a hue and cry, two more witnesses came who saw the accused running away. The testimony of the two witnesses satisfied the Court to convict the accused. It is doubtful from the perusal of other cases in this chapter what the Court would have decided had it been a case of Zina bil jabr rather than an attempt only.

The position of an unmarried girl aged somewhere between fifteen/sixteen years seems to be better in Bangladesh as was decided in Abdul Quddus v. State.[126] The girl was kidnapped from her house and was forcibly raped against her will. The Court held that even if she had consented, the consent was obviously fabricated by the accused although it appears from reading the case report that she had been travelling with the accused to many places.

The Courts in Pakistan are sympathetic where children or married women suffer. The case of Zina bil jabr is not converted to a case of Zina. It may be mentioned that a child witness may not be able to

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[125]Muhammad Aslam v. The State PLD 1985 FSC 282

[126]Abdul Quddus v. State. 35 DLR 1983 HD 373

narrate something as properly as an adult would do. It has however been found in research done in the west that both adults and children sometimes make false allegations of sexual crimes. But the incidence of such false allegations both for adults and children is considerably lower than once was believed.[127] The only reason for believing a married woman in contrast to an unmarried woman in Zina bil jabr cases may be to protect the family honour and married life of a couple.

The case of Abdul Rehman v. The State[128] is a case of Zina bil jabr on a married woman. She suffered injuries and marks of multiple violence was found on her body by the doctor. The doctor corroborated her version along with the version of the two eye witnesses who are her brothers. The case was decided in favour of the woman.

The prosecution, in the case of Javed Iqbal v. The State[129] was based on the testimony of a woman that the accused got the room opened on the false pretext that her husband had suffered shock and they had come to fetch some ghee (melted butter). On entering they asked her to go with them to satisfy their lust. At this point she was joined by another female witness, her mother in law. Then the accused used force against both of them. Later two more male witnesses came in. The Court believed the narrative and awarded punishment to the accused.

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[127] Spencer and Flin, 1990, p. 269; also see chapter 3.1.3.1

[128] Abdul Rehman v. The State PLD 1985 FSC 131

[129] Javed Iqbal v. The State PLD 1985 FSC 141; in a similar case of Sher Ali v. The State 1985 P Cr. L J 349 at p. 456 [Lahore] the testimony of a magistrates wife corroborated by her young son was accepted.

In Ajaib and another v. The State,[130] two married women and an unmarried girl was subjected to rape when they went to collect faggots from the forest. The Court not only enhanced the punishment but observed that the accusseds cannot be shown any leniency because of the atrocious nature of the crime committed on helpless women. Had the unmarried girl alone been raped, her fate perhaps would not have been better than the girls described above in Sultan Maqsood v. State or Sohail Iqbal v. The State.

Children seem to be believed in case of Zina bil jabr committed on them. Consent is predetermined by law so the case is decided on the issue of identification of the defendant and whether or not the abuse occurred. A consent defence is inapplicable in child abuse cases.[131] Section 90 of the Penal Code considers that children under the age of twelve years are not capable of giving consent. No child is capable of committing any crime until the age of seven years by the statutory provision of section 82 of the Penal Code. A child who has reached the age of twelve years may be considered to have committed the crime if s/he is found to have a mental understanding of doing that under section 83 of the Penal Code. The Courts are therefore bound by law not to change the case of Zina bil Jabr to a case of Zina. The mental maturity needed to commit a crime is different from the mental maturity needed to understand the questions to prove a case. The maturity to understand questions and to answer them is

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[130] Ajaib and another v. The State 1981 P Cr. L J 979 at p. 983 (Azad J&K)

[131] Ghulam Ahmad v. The State 1981 P Cr. L J 173 at p. 176 [Lahore]; Isquith, Peter K, Murray Levine and Janine Scheiner, 'Blaming the Child : Attribution of Responsibility to Victims of Child Sexual Abuse' in *Child Victims, Child Witnesses Understanding and Improving Testimony* edited by Gail S. Goodman and Bette L. Bottoms, New York et al, 1993, pp. 203-228 at p. 210

determined by the Courts in each case. Some of the case law below would clarify the position.

In Phalla Masih v. The State,[132] a case of Zina was filed by the brother of the victim. He was the only eyewitness. The Court concluded that the statement of the girl aged seven/eight years old, read with the medical report, established that an attempt to rape her was made by the appellant. The statement of the girl inspired confidence and it needed no further corroboration.

A girl aged five years was the victim of Zina bil jabr in the case of Burhan v. The State.[133] She appeared in the Court but as she was too tender in age to make any statement, none was recorded. The mother of the victim supported her version in details in the first information report. The two male eye witnesses who had rushed to the place of occurrence on hearing the alarm and cries of the mother of the victim fully corroborated her version. The lady doctor stated that the victim was subjected to forcible rape. In such an incident the victim could also die. The Court believed all the four witnesses. The Court also stated that merely because the two male eye witnesses happen to be relations their testimony could not be rejected.

In Suleman v. The State,[134] a case of Zina, an open exposé of the occurrence was furnished by the six year old victim. Before recording her statement, the trial Court tested her intelligence Being satisfied that she was capable to give rational answers the Court recorded her statement. In her statement she charged the

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[132]Phalla Masih v. The State PLD 1989 FSC 72

[133]Burhan v. The State PLD 1989 FSC 77

[134]Suleman v. The State PLD 1989 FSC 13

accused right away by stating the details of his committing the offence on her. The accused was found guilty of the offence.

The victim of Zina was aged about seven/eight years in the case of Muhammad Ashraf v. The State.[135] She contiguously charged the accused appellant and gave the full details from the beginning to the end of the incident in question in clear and unequivocal terms. Nothing favourable to the accused was brought out by the defence during her cross examination. She was medically examined the same day and according to the medical report she had been subjected to sexual intercourse in a most brutal and inhuman manner. This was further supported and corroborated by the statements of the complainant and other two eye witnesses who were attracted to the spot on hearing the shrieks of the victim. The case was fully established in favour of the child victim.

It also seems that where children are the victim of Zina bil jabr the Courts may enhance the sentence.[136] The Courts believe that it is impossible that a father would play with the future life of his child on the plea of rape.[137] The situation in the Courts of Pakistan seems absurd in case of young unmarried ladies. Once the Court has transformed a case of Zina bil jabr to a case of Zina it expresses its sympathy towards the woman victim. There could not have been a better display of men chauvinism than the case law of Pakistan. Transferring of a case from Zina to Zina bil jabr is in itself injurious. To show sympathy after injuring a woman is adding insult to injury.

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[135] Muhammad Ashraf v. The State PLD 1987 FSC 33

[136] Muhammad Rashid v. The State 1987 P Cr. L J 1445 at p. 1450 (Azad J&K) following PLD 1987 SC (AJ&K) 9

[137] Sarwar Shah v. The State 1985 P Cr. L J 1142 at p. 1147 [Karachi]; Mubarik Ali v. The State 1980 P Cr. L J 23 at p. 25 [Lahore]; Muhammad Aslam v. State PLD 1985 FSC 282

Rape and therefore Zina bil jabr should leave some marks of violence and injuries of greater or less extent on the body and extremities be it on young female, unmarried or married woman. As for married woman as the intercourse is presumed to be without her consent, it is most likely that under proper resistance some injury will be done.[138] It seems that while the Court is diligent to find injuries in unmarried women it is averse towards asking any question in that direction to married women.

In the case of Muhammad Akram v. The State[139] when the appellant appealed to examine some of the points in the appraisal of evidence the Court did not want to interfere with the decision anymore, once it has been settled as a Zina case. Rather the Court argued in favour of the victim who was however decided to be a guilty associate. An argument of the accused appellant was based on the assumption that the prosecutrix, having been used to sexual intercourse, she should not have been relied upon because of her so called moral depravity. The Court found this not justifiable, as it was too wide to be accepted in every case. In the present case it was only an assumption that she might have been used to sexual intercourse and on that basis the benefit of possible consent had been allowed to the appellant in the conviction and sentence for lesser offence. On the other hand in this case firstly the medical evidence did not disclose whether the prosecutrix was under abusive sexual intercourse or intercourse under compulsion or deceit and/or whether or not the condition found on examination was not on account of other causes including self abuse. Therefore, merely the opinion of a doctor, as in this,

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138 Baynes, C. R., *Hints on Medical Jurisprudence*, Madras, 1854, pp. 124-126

139 Muhammad Akram v. The State PLD 1989 SC (Sh. App. B) 742

would not weaken the testimony of the prosecutrix and would not for that reason necessitate any further supporting evidence for basing the conviction on her statement, if otherwise she appears to be reliable and her testimony inspires confidence. In this case the two lower Courts had carefully tested her veracity, and the Supreme Court could not find any infirmity in the testimony of the prosecutrix.

It seems that the message in some of the decisions of the Supreme Court cases to the women is not to work, or go outside, irrespective of family need, social structure and poverty. The decisions which turn a victim into an accused are simply against human dignity and law.[140] It may be noted that from the reading of the case law it appears that the lower strata of the society is more involved in Hudud cases[141] and only a few cases are reported.[142] These women suffer shame and humiliation and their chances for future happiness are dashed, for they are no longer eligible to be 'blushing brides'. Her pain and humiliation is increased by bringing in a law suit where she must recount a story of private pain and humiliation, perhaps of unfulfilled promises of eternal love, of sexual importuning and its consequences. No woman would willingly expose the details to the public at large. But the fact that a woman brought a cause of action exposed her as a kind of person who deserved no sympathy. [143]

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[140]Sultan Maqsud v. State PLD 1985 SC (Sh. App. B.) 305

[141]This is affirmed also in Jahangir, 1990, p. 135

[142]Jahangir, 1990, p. 130

[143]Coombs, Mary, 'Abandoned Women' in *At the Boundaries of Law Feminism and Legal Theory*, edited by Martha Albertson Fineman and Nancy Sweet Thomadsen, New York and London, 1991, pp. 248-264 at pp. 249-252

The suffering of women is due to the unequal treatment towards them by the society sanctioned by law. Whether the inequality in law is reframed as social injury or not, it is important primarily to check the uneven development of law in order to solve the initial problems of women.[144]

It is to be noted that in Pakistan not a single case of stoning to death has yet been reported. It has attracted a wide publicity that the law of Rajm is introduced in Pakistan. However, the Zina Ordinance states that for the execution of Rajm the witnesses who deposed against the person would start stoning. It is not clear who will start stoning when the case would be proved solely on confession. The travesty of the law is clear because stoning to death mentioned in the traditional Islamic law is introduced in a token form. When stoning is started the accused will be shot dead meanwhile and the stoning will be stopped.

6.2.3 Influence in Bangladesh

Without going into the *pros* and *cons* of the law relating to Rajm and Hudud laws any further it is important to mention that the the status of female witness testimony and Rajm in Pakistan have influenced at least one section of society in Bangladesh. There are two instances of influence regarding testimony and stoning to death.

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[144]Howe, Adrian, 'The Problem of Privatized Injuries : Feminist Strategies for Litigation' in *At the Boundaries of Law Feminism and Legal Theory*, edited by Martha Albertson Fineman and Nancy Sweet Thomadsen, New York and London, 1991, pp. 148-167 at p. 167

6.2.3.1. Female Witness Testimony in Bangladesh

The position of women as witnesses in Bangladesh is not a contested issue. The Court give emphasis on taking or leaving the testimony of women based on the facts of each case and demeanour of the witnesses.

In one case it seems that the position of women witnesses in Hudud offences in Pakistan must have befogged the mind of the learned counsel in a murder case. He did not perhaps realise that the position of women witnesses in murder cases have not changed in Pakistan at that time. In Noor Islam and others v. The State,[145] the learned counsel for the accused contended that as all the eight witnesses to the murder were women, they could not be relied upon. It was held by the High Court that evidence of female witnesses cannot be discarded only because they are females. Rather, the Appellate division of the Supreme Court in another case, Sk.Shamsur Rahman v. State[146] found the prosecution at serious fault as it did not examine the mother, sister and the wife who were present during the death of the deceased.

In Bangladesh the woman witness is accepted or rejected depending on the probative value of the witness testimony. In the murder case of Babor Ali Molla[147] the eye witnesses were two women, the first and second wives of the deceased. The Appellate Division of the Supreme Court of Bangladesh after careful consideration of these two material witnesses, did not rely on their testimonies.

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[145] Noor Islam and others v. The State 36 DLR 1984 HD 123 at p. 125

[146] Sk.Shamsur Rahman v. State DLR 1990 AD 200

[147] Babor Ali Molla 44 DLR 1991 AD 11

6.2.3.2 Stoning to Death in Bangladesh

Another influence in relation to stoning to death or Rajm was at a village level, where the public became involved, along with the religious leader of that area. This news has been reported in the press.

A young girl, Nurjahan, was given in marriage by her parents. Her husband remained a missing person for a long time. A religious leader named Mannan proposed to marry her. Instead of giving her in marriage with Mannan her parents married her off to a young man called Mutalib. On this Mannan called a panchayat after 45 days from the date of marriage of Nurjahan. He gave Fatwa that the marriage and the conjugal life of Nurjahan were illegal. He ordered the village people to stone Nurjahan with 1001 stones after standing her in a 2 foot pit. This was complied with by the village people. Nurjahan died at the spot. Even Nurjahan's parents and husband were stoned but they survived. A case was filed by Mutalib, Nurjahan's husband.[148]

Some of the legal and social points that needs to be clarified are :

It is not known for how long Nurjahan's former husband was a missing person. By the Dissolution of the Muslim Marriages Act, 1939 Nurjahan could have asked for dissolution of her marriage with her husband if he was absent for four years or by section 107 of the Evidence Act,1872 if he was absent for seven years.

It was not established whether Nurjahan cohabited with her former husband. Proof of non cohabitation would have made her marriage with Mutalib legal by itself. In the Hanafi school of thought,

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[148] *Surma*, editor Nazrul Islam Bashon, London, 15-21stJan 1993

seclusion of husband and wife raises the presumption of cohabitation.

If religious law were to be followed, Nurjahan could even have divorced her former husband by way of 'Ila (a kind of divorce) after the absence of the husband for four months although 'ila is not in practice in Bangladesh. She could have divorced her husband by way of Khula (divorce initiated by the wife) by payment of her dower if she received it or simply by denouncing her dower if she did not receive any.

The criminal law in Bangladesh does not follow the Hudud law. Even if Hudud law were applicable, the only authority to apply it would be the Court and not any religious leader. Even if Hudud law was followed as the people in villages follow laws analogous to Islamic law, the procedure was totally unislamic in Nurjahan's case. There was no proof of four witnesses or confession of the accused. By Islamic standard Nurjahan's marriage was at best an irregular marriage in absence of any of the proof mentioned above. Certainly she was not committing Zina.

The press news did not provide details as to the nature of Nurjahan or the class and kind of persons involved in killing her. The puzzle would still be there as to why the people stoned Nurjahan to death, even if one had to ask whether the people of the village were fed up of her because of her nature or whether in the pretext of her "illegal" marriage they wanted to get rid of her. There is a possible explanation that it was a public fervour in which all got swept away and there was not a single right minded person to stop it, even by informing the police. It is also possible that due to poverty and a monotonous life, a change was needed. Whatever might have been

the reason it is an impossible situation to understand by any reasonable explanation.

There is no doubt that Mannan has acted heinously out of his own lust and satisfaction in the guise of a religious leader. It is also alarming that the village people can be so easily swayed by religious leaders without questioning their authority or legitimacy.

One may consider the possibility that the village people of Bangladesh are mentally prepared for the application of the juristic Islamic law. It is not known how many people exactly were involved in the case of Nurjahan. It might have given an idea of the representation of the whole country or of the district. Some research in this area might be useful to find out how the mass in Bangladesh perceive the juristic Islamic law.

6.3 Conclusion

Pakistan has introduced the traditional Islamic Law of evidence whereby theoretically a woman has an inferior position than a man. The case law has established a rigid interpretation of the statutes in Pakistan in the light of the traditional Islamic law, although there was room to introduce more flexible rules regarding woman. There is no such introduction or amendment of Islamic law in Bangladesh in this regard. In Bangladesh a woman theoretically enjoys the same position as a man in giving evidence. While Pakistan introduced the regressive rules for women it omitted any review of the dissenting rulings of early Islamic scholars who are revered so much in any Islamic academic discussion. The Council of Islamic Ideology carefully avoided being dragged into in-depth research to find an acceptable position for woman. There was much reaction among the educated class of women in Pakistan, who form only a small

percentage of the whole population of women in Pakistan. At the same time the uneducated women forming the lower strata of the society continue to suffer humiliation. They do not know the new law and they can not follow its intricacies. If the learned scholars of Pakistan had made an objective effort to examine the position of women in the law of evidence in the true spirit of Islam, they might have found a law closer to the law in Bangladesh at the moment. It must be kept in mind that it is hardly possible to decide a case within the scope of Hudud punishment, and moreover Pakistan does not seem to have any intention of punishing an accused with Hadd law. If most of the cases are to be decided within the category of Tazir then this should be expressly said. There is no bar in the traditional Islamic law in accepting even one woman witness for inflicting Tazir punishment. However by deciding cases within the category of Tazir offences the Court has not deviated from the practice existing before the Hudud laws where the testimony of a single woman witness were accepted. Since capital Hadd punishments are not awarded in Pakistan there is a continuation of the existing law in the form of Islamic Tazir law .

Bangladesh seems to have been influenced by the changes in the law in Pakistan in two circumstances. This kind of influence is dangerous for the women in Bangaldesh no matter how little the influence might be. It is necessary both in Pakistan and Bangladesh to portray the real picture of woman in Islam, i.e. equal rights and duties of man and woman. Otherwise those women who are kept behind by the traditional Islamic law to remain in parda in safety, would be dragged mostly into public without any safeguard on their part to defend themselves by testimony or other evidence.

CHAPTER 7

7. Conclusion

This chapter draws a conclusion to the thesis. It discusses and remarks on the reluctance in the Indian subcontinent to introduce the English law of evidence regarding the aspects discussed in this research; the continuation of the customary law at the village level; the Islamic law and the nature of Islamic law; and the attitude of the Courts in Pakistan and society in Bangladesh regarding Islamic law. Thereafter it discusses the probative value of witness testimony and confession; and finally it discusses the issue of women and female witness testimony. The chapter ends with a concluding summary and recommendations.

7.1 Retention of the Existing Law

The Indian subcontinent as ruled by Muslims and previously by the Hindus already had developed a well defined system of their own before the British arrival. The Evidence Act, which was drafted by the third law commission and revised by Fitzjames Stephen has remained on the statute book substantially unchanged. It is interesting to observe that the Act has retained the existing law of the Indian subcontinent in terms of confession and refusal of a witness to answer. That a statement made to a police officer is inadmissible in evidence, and that a witness cannot refuse to answer a question on the ground that his answer might incriminate him, are not English law.[1] The rules regarding the shaking of the

[1] Mootham, Sir Orby, 'The Indian High Courts before and after independence' in *South Asia Seminar*, South Asia Regional Studies University of Pennsylvania, Philadelphia, 1966-67, pp. 173-284 at p. 183

credibility of a witness was the retention of integrity of witnesses is another form which did not have any basis in English law.[2] Section 32 of the Evidence Act was also not meant to be so narrow as the English law or to introduce all possible safeguards. Statements made by dying persons were acceptable in English law only when the declarant had subjective apprehension of death. Section 32 focuses on the statement relating to the cause of death rather than expectation of death.[3]

Morley in 1858 remarked that in considering the propriety of altering or abrogating the Hindu or Muslim laws, all pre conceived notions of the relative excellence of the English and native systems of jurisprudence should be taken as secondary considerations; nor should it be called in question whether such systems are in themselves good or bad; for it should never be forgotten that in the present state of society in India, they are undoubtedly the best adapted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of the faith of that people; and that though we may not bound by absolute treaty we have virtually pledged ourselves to preserve them by repeated proclamations and enactments.[4] It seems that when the Evidence Act was promulgated in 1872 the members of the final draft committee decided to respect the demand from the society although it is oft repeated and there exists a popular feeling that the Evidence Act is based on common law. Formally, it is possible that English law may have been introduced into the Evidence Act to a certain extent.

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[2]*Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the purpose of Making Laws and Regulations*, 1872, Vol. XI, Calcutta, 1873, pp. 131-133

[3]Rankin, 1946, p. 129

[4]Morley, 1858, p. 197

But as far as the aspects of witness testimony seen in this thesis, they are not influenced by English law.

The Indian Evidence Act, however, repealed all the rules of evidence not contained in any Statute, Act, or Regulation.[5] It could hardly achieve that end as is apparent from the procedures in the village council, because those parts of India which in 1784 passed under the British governments rule were only a tiny proportion of the whole area : even before British departure in 1947, she ruled directly less than two-thirds of India.[6] A study made in two West Bengal Villages in 1960-61 is true for the village societies in Pakistan and Bangladesh even today. It was found that the form of village trials is elaborate, allowing great freedom for the presentation of evidence and testimony. The content of the proceedings may fall short of the conception of 'equal justice for all', since the judges implicitly aim to convict the accused, and techniques such as intimidation or minor ordeals may be used to extract a confession.[7]

7.2 Effect of Islamic Resurgence in Pakistan and Bangladesh

Lawyers and judges trained in the common law system have taken the view, by and large, that the existing law of evidence, supposed to be based on the common law, is satisfactory and requires only a few changes to conform to enduring Islamic principles.[8] It is to be noted

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[5]Rankin, 1946, p. 111

[6]Brett, S. Reed, *A History of the British Empire*, 1st pub., London et al, 1941 re 1949

[7]Nicholas, Ralph W. and Tarashish Mukhopadhyay, 'Politics and Law in Two West Bengal Villages' in *Articles on Indian Law* by Charles Morrison and Marc Galanter, [A binder of collected articles available in SOAS library] pp. 17-40 at p. 25

[8]Faruki, Kemal A., 'Pakistan Islamic Government and Society' in *Islam in Asia: Religion, Politics and Society* edited by John L. Esposito, New York et al, 1987, pp. 53-78 at p. 68

that the Sunna in Islamic law may be looked upon as one great body of precedent, a large body or portion of which consist of decisions passed by the Prophet on questions relating to the religion and law which he promulgated. In addition to this the numerous collections of the Fatawa of celebrated lawyers form a mass of precedent hardly surpassed in the legal literature of any nation, and constantly referred to as authoritative in all Muslim Courts of Justice.[9] Most probably for this reason the present day lawyers who have inherited a system of the Islamic common law centuries old do not find themselves at a great difficulty in conforming to the Islamic law.

In this context the observation of the Law Commission of India regarding Hindu law would be of much interest as it is as much relevant to the Islamic law which was officially in full force before the British takeover. In 1958, proposals for an indigenous system were among the many matters taken up by the Law Commission of India in its full-dress survey of the administration of justice. The Commission found that even a brief depiction of the ancient system

> " shows how unsound is the oft-repeated assertion that the present system is alien to our genius. It is true that in a literal sense the present system may be regarded as alien. It is undoubtedly a version of the English system modified in some ways to suit our conditions ..... But it is easy to see that in its essentials even the ancient Hindu system comprised those features which every reasonably minded person would acknowledge as essential features of any system of judicial administration, whether British or other ..... We can even hazard the view that had the ancient system been allowed to develop normally, it would have assumed a form not very much different from the one that we follow today."[10]

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[9]Morley, 1958, p. 334

[10]Galanter, Marc, *Law and Society in Modern India*, Delhi, 1989, pp. 41-2

It may be argued that the system that has developed could not be said to be an alien system because in fact this law was codified keeping in view the social needs and customs of the Indian people.

The Indian subcontinent comprises different cultures and religions. The re-introduction of Islamic laws of evidence on principle may therefore be justified to find out its true nature as far as it differs from the existing law, i.e. the Evidence Act, 1872, and practice of the Court. Charles Kennedy claimed that it is generally acknowledged that the High Courts are less congenial to Islamic judicial reforms than is the Federal Shariat Court, and perforce less likely to adopt a judicial doctrine which claims an expansive role to examine issues for repugnancy to Islam.[11] The reason perhaps is that judges sitting in Federal Shariat Court are trained in Islamic jurisprudence and therefore most likely to be capable of examining issues repugnant to Islam. It appears that even the High Court judges nourish resurgence of Islam. The Lahore High Court in a recent decision, remarked that the common law of England is not and cannot be the common law or the national law of Pakistan as it is governed by written Constitution and has an ideology based on Islam.[12] This observation also reflects the popular understanding that the Evidence Act and other laws codified during British rule are based on the common law of England although in this thesis it is found not to be totally true.

The reintroduction of Islamic law in Pakistan is applicable to all its citizens, Muslims and non-Muslims. For a Muslim, submission to

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[11] Kennedy, Charles H., 'Repugnancy to Islam--who decides? Islam and Legal Reform in Pakistan' in *International and Comparative Law Quarterly*, 1992, Vol. 41, pp. 769-787 at p. 786

[12] Syed Ghayyur Hussain Shah and another v. Ghaib Alam PLD Lahore 1990 432 at p. 444

Islamic law is at the same time a social duty and a precept of faith. Whosoever violates it, not only infringes the legal order but commits a sin.[13] According to Islamic legal principles Islamic law should be applied to all criminal cases committed within its own territory regardless of the culprit, and over the crimes committed by its own citizens outside its territory.[14] The term tolerance from the Islamic viewpoint can be understood from the acts or practices which are permitted under some provisions of the Qur'an and the Sunna and the juristic interpretation thereof. Tolerance implies that if the adherents of different faiths residing in a Muslim country insist on following their own beliefs, personal statutes and practices derived from it, they may do so provided that their liberty should not be considered as absolute; for liberty if it is not properly used it could conflict with the rights of others. So non-Muslims rights will be questioned if they fail to respect, or try to undermine the law of the country, or violate the principles of Islam, or if they tend to disturb the peace and general security of the country.[15] This had to be clarified by the Court decisions and general statement to the non-Muslims residing in Pakistan. Law of evidence practised in Muslim India was so strict that it was often easy enough to discover elements of doubt.[16] Though the harshness of Islamic Criminal law is mitigated by the rules of evidence which practically exclude the possibility of carrying them into effect,[17] the non-Muslims should

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[13] Santillana, David De, 'Law and Society' in *the Legacy of Islam* edited by Sir Thomas Arnold and Alfred Guillaume, Oxford, 1931, pp. 284-310 at p. 288

[14] Awang, ABB, *The status of Dhimmi in Islamic Law*, Ph. D. Thesis, University of Edinburgh, 1988, pp. 137-8

[15] Sharfuddin, Abul Muhsin Mohammad, 'Tolerance in Islam' in *Voice of Islam* 1972, Vol. XX, pp 582-592 at p. 582; Ramadan, Said, *Islamic Law its Scope and Equity*, London et al, 1961, pp. 144-149

[16] Banerjee, A. C., *English Law in India*, New Delhi, 1984, p. 57

[17] Kulshreshtha, V. D., *Landmarks in Indian Legal and Constitutional History* revised by Vijay Malik, 3rd ed., Lucknow, 1975, p. 263

be given assurance as to their personal law, life and property. If necessary with their consent the law of divorce can be changed.

As far as Bangladesh is concerned the feasibility of any radical secularisation was minimal in its initial days and still is so now.[18] On the other hand Razia Akter Banu has called for caution in finding too much of Islamic resurgence in Bangladesh in the post 1975 period. She asserts that the military rulers of Bangladesh, suffering from an innate sense of illegitimacy, have been trying to gain popularity by resorting to Islamic slogans on the pattern of the power elite of the former united Pakistan. The changes brought in the Constitution to give it an Islamic character according to her is more cosmetic than substantial.[19] One may derive from such changes that there must be a popular demand from the mass whether cosmetic or substantial. If the rulers and elites of the country did not bring such changes, the Islamic resurgence still would have grown among the common people. It would be totally wrong to judge the characteristics of a country by the power elite only. It is for this purpose the power elites should be aware of the need of the country. It cannot be denied that the present ruling party of Khaleda Zia played Islam as its mandate, among other promises for electoral victory.

7.3 Comprehensive Nature of the Case Law

The analytical chapters of this study are based on case law. Lahore High Court warned that every judgement must be read as applicable to the particular facts proved, or assumed to be proved, since the

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[18] O'Connell, Joseph T., 'Dilemmas of Secularism in Bangladesh' in *Religion and Social Conflict in South Asia* edited by Bardwell L. Smith, Leiden, 1976

[19] Banu, 1992, p. 148

generality of expressions which may be found there are not to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expression are to be found. The case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it.[20] Any expression of opinion even in general term in case must be confined to that particular case barring of course when a certain basic legal principle is laid down.[21] It must be noted that even then when scanty material is collected from a huge number of case law to the same effect, it cannot be said to be devoid of propositions. Whatever the Courts have practised for a long time as a rule of prudence, without having any force of written law still forms the precedents which lower Courts are bound to follow. Therefore issues discussed in this study form a distinct law of witness testimony derived from the precedents.

7.3.1 Credibility of Witness Testimony

In Islamic law emphasis is put on the truth of the statement along with the just nature of the person. His maturity is important to ensure accuracy and memory. Islamic jurisprudence is not unaware of human fallibility. This is apparent from the huge works on Hadith literature and their compilation. The way the scholars of Hadith literature tried to ensure the authenticity of Hadith by checking and rechecking with different scholars and by looking at the justness of the person of each relater of Hadith is explanatory of itself about the problem of unwilling distortion. Islamic law of witness testimony

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[20] Iqbal Begum v. Farooq Irayat PLD 1993 Lahore 183 at p. 193; Justice Fazal Karim in Syed Ghayyur Hussain Shah and another v. Ghaib Alam PLD 1990 Lahore 432 at p. 439

[21] Ali Asghar Khan v. The State 1983 P Cr. L J 238 at p. 246 [SC (AJ&K)]

has developed by following the method of compiling Hadith literature. Independent testimony from at least two just witnesses to weigh the probative value is insisted. Yet complete truthfulness is one of the rarest of virtues. Even those who regard themselves as absolutely truthful are daily guilty of overstatements or understatements.[22] The memories of human being may serve extremely well for the most part, but human memory was not designed for the benefit of the legal system. When a person is asked to describe events or identify someone after seeing them only briefly and possibly having not paid a lot of attention to them, he or she is being asked to do something that the memory is not adapted to do well.[23]

In this regard the rules of appointing a judge during Mughal rule would be of interest. The supreme authority should appoint a person who is discreet and unbiased as his judiciary delegate. This person must not be content with witnesses and oaths, but hold diligent investigation of the first importance, for the inquirer is uninformed and the two litigants is cognisant of the facts. Without full inquiry and just insight it is difficult to acquire requisite certitude. From the excessive depravity of human nature and its covetousness, no dependence can be placed on a witness or his oath. By impartiality and knowledge of character, he should distinguish the oppressed from the oppressor, and boldly and equitably take action on his conclusions. He must begin with a thorough interrogation and learn the circumstances of the case. He should keep in view what is fitting in each particular and take the question in detail, and in this

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[22]Spencer, Herbert, *The Principles of Ethics (1897)*, Indianapolis, 1978, Vol. I, p. 433

[23]Lloyd-Bostock, Sally, 1988, p. 4

manner set down separately the evidence of each witness. When he has accomplished his task with intelligence, deliberation and perspicacity, he should for a time, turn to other business and keep his counsel from others. He should then take up the case and re investigate and inquire into it anew, and with discrimination and singleness of view search it to its core. If capacity and vigour are not to be found united, he should appoint two persons a Qazi who will investigate, and a Mir A'dl to carry out his finding.[24] It is clear that even in those days the Court would be careful in accepting or rejecting the testimony of a witness. The number only did not suffice. Though the procedure of Islamic law of evidence is projected as primordial of producing a required number of witnesses, but in effect it was more elaborate, and as effective as a living system could be. The psychologist-lawyer Murston(1924) in USA used an event test not just to study the accuracy of testimony but also to evaluate whether finders of fact can determine what did and did not occur on the basis of testimonial evidence. He found not only that the witnesses and jurors made some mistakes, but that even the judge had a considerable margin of error.[25] It is therefore very important for the ability also of the judge to record, store and retrieve the information correctly.[26]

Integrity in Islamic law for the purpose of Hadd and Qisas is different from the credibility of a witness in Tazir law applicable in

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[24] *Ain I Akbari* of Abul Fazl-I-'Allami translated into English by Colonel H.S. Jarrett, corrected and further annotated by Sir Jadunath Sarkar, 2nd ed., Calcutta, 1949, pp. 42-3

[25] Levine, Felice J. and June Zouin Tapp, 'Eye Witness Identification : Problems and Pitfalls' in *The Criminal Justice System A Social Psychological Analysis* edited by Vladimir J. Konezni and Ebbe B. Ebbesen, San Francisco 1982 pp. 99-127 at pp. 111-2

[26] Loftus, Elizabeth F., 'Eyewitness Testimony : .....' 1979 pp. 105-151 at p. 144

Pakistan or general criminal law applicable in Bangladesh. The law of evidence is strict in former two cases to ensure the gravity of the crime. In later case it takes into account of public interest and social needs in punishing the offender. Islamic law initially puts a ban on a witness who is not of high moral standard. When the moral integrity of a witness is in question for practical reasons the burden of proof gets higher. A witness with a high moral standard would in theory have a lesser grade of burden of proof. While it is accepted that the human and legal process of identification contains risk of error and to a substantial extent eyewitness testimony can be unreliable[27] two witnesses by itself in a Hadd or Qisas case would not ensure the maximum punishment of Hadd or Qisas. The rules of integrity are in fact unattainable.

The scientific community had long viewed eyewitness testimony with scepticism for two basic reasons : the normal and universally acknowledged fallibility of perception and memory, and the susceptibility of the mind to suggestive influences.[28] The Courts continuously assess the nature of witnesses in Tazir offences and the general criminal law by denoting terminologies of different categories. Some of the terminologies used by the Courts or identified by the written law are easy to understand from the context of the case or from the usage of these terms for long time, e. g. trap witness, recovery witness, hostile witness, privileged witness, Court witness, etc. But it is very difficult to come to a definite conclusion as to the interested, independent, partisan, and chance witness, etc. This terminology leaves space for the Court to make subjective

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[27]Zalman, Marvin and Larry Siegal, 'The Psychology of Perception, Eyewitness Identification, and the Lineup' in *Criminal Law Bulletin* 1991 Vol. 27, No. 2 pp. 159-176 at p. 160

[28]Arnold et al, 1984, p. 4

definition regarding them which ultimately affects the case decision. The series of the intricate pattern of denoting a name to the witness shows a subtle moral evaluation and credibility of the witness in Pakistan and Bangladesh.

Article 3 of Qanun-e-Shahadat and section 118 of the Evidence Act has left the judges with leeways. The rule of understanding and prudence is qualified with interested, independent, natural etc. types of witnesses. Competence, as seen in the previous chapters through the Court decision, is more to do with the understanding of a person of the fact of a case than his personal integrity or interest in the case. For that reason relatives or other interested witness are not rejected outrightly.

The burden of proof on a natural witness is less because s/he must have perceived things better due to his presence. Combination of any two or three categories would regrade the burden of proof. It is the distribution of proof within the system of witness testimony to lead to the establishment of truthfulness of a fact. It is a weighing of balance between two parties for fact finding. The Courts are however involved in laying out rules for admitting the testimony of the interested, partisan, chance witnesses, etc. There is a constant reminder expressly or implicitly that whenever independent witnesses are available the testimony of other kind of witnesses is corroborated with them. In the absence of independent witnesses the testimony be scrutinised carefully with other available evidence on record. Corroboration is a rule of law regarding them. For independent and/or truthful witnesses corroboration is a rule of precaution. The Courts however are uncomfortable with the testimony of the relatives. The Courts have spent their time making rules for the admissibility of their evidence.

Like that of relatives there seems some implicit discomfort regarding a police official testimony in the decision of the Court. Most of the time the judges would mention that a police official cannot be disregarded because of the office he holds. There is a tendency on the part of the judges to accept their testimony. While helping to insulate the police from arbitrary political manipulation, this movement also attenuates the aims of substantive political justice, including those of police accountability, local community review, and control of police discretionary policy making powers. There should be reforms in police organisations substantially aimed toward creating the informal, skilled and judicious police officer.[29]

The rule of testimonial competence rely most heavily on judicial institutions and discretion, mostly in cases involving child and disordered witnesses. The evidence of children is important mainly because the judiciary has to use it in order to deal with child abuse. It is not known how long the child waits to give evidence. The accuracy is lower with the passage of time. But they could be reliable in their recollection as adults.[30] The observation of Munsterberg was resistance to suggestions is weaker in girls than boys. Young people are weaker than grown ups. Resistance of the adult person may sink to the low level of that of the boys and girls. The effect of suggestive or leading question in breaking down the true memory could be alarming.[31] Mental status of the witness is given much less subtle analysis than usual[32] by the Courts in Pakistan and

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[29]Rumbaut, Ruben G. and Egon Brittner, 'Changing Conceptions of the Police Role : A Sociological Review' in *Crime and Justice An Annual Review of Research*, Vol. I edited by Norval Morris and Michael Tonry, Chicago, 1979, pp. 239-288 at p. 239

[30]Flin, Rhona and J.R. Spencer, 'Do Children Forget Faster' in *Criminal Law Review*, 1991, pp. 189-190 at p. 190

[31]Munsterberg, 1927, pp. 182-3

[32]Munsterberg, 1927, p. 150

Bangladesh. The value of the quality, i. e. accuracy of the eye witness input can be assessed from the importance attached to the information provided by victim and bystanders of crime attendant with fallibilities.[33]

There is virtually nothing written on the subject by lawyers or medical practitioners except sex in law. The cause of the lack of interest in legal medicine by lawyers and medical practitioners most probably lies in the intellectual and social history of both Pakistan and Bangladesh. More developments within medicine itself _____ scientific, institutional and professional would perhaps give expert testimony a heightened significance for the medical profession. If training in medical jurisprudence was made a requirement for the professional qualification of the practitioners in Pakistan and Bangladesh, this would also heighten the significance of expert testimony of medical witnesses.[34] Medical Jurisprudence and forensic science should be included in the law syllabus.[35]

Witness oriented evidence is prepared to avoid what is hearsay.[36] Article 2 of the Qanun-e-Shahadat and section 3 of the Evidence Act respectively describes facts in relation to the five organs of perception. The best available witness is and should always be preferred. No matter how specifically the sense organs may function, the signals cannot be conveyed to the brain in the same form as they are received. Human mind is susceptible to making

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[33]Levine, Felice J. and June Zouin Tapp, 'Eye Witness Identification.....' 1982 at p. 100

[34]The idea is developed from reading C. Crawford's D. Phil.. Thesis entitled *The Emergence of English Forensic Medicine : Medical Evidence in Common Law Courts, 1730-1830,* University of Oxford, 1987

[35]Agarwal, C. B., 'A Plea for the Teaching of Medical Jurisprudence and Forensic Science' in *Legal Education in India Problems and Perspectives* edited by S. K. Agarwala, Bombay, 1973, pp. 193-5 at pp. 194-5

[36]Stein, 1990, p. 43

mistakes no matter how diligent they are.[37] There are no absolutes in perception: instead, what is perceived may roughly be described as a series of functional probabilities.[38] The problem of faulty identification is particularly important because many law enforcement officials and judges seem to exhibit extraordinary confidence in eye witness data. Retention and information weakens over time. People, not always consciously, distort reality in ways reflecting their biases.[39] Moreover, a victim or a witness may be heavily oriented to gear their behaviour to be congruent with their image of what 'competent witness' is able to do. The legal system of three or four stages by which a case is decided could make a victim or a witness assert the lie told first time. The first time lie could hold through self persuasion.[40]

Prosecution witnesses are often subjected to threats or violence by some "invisible hand" and abstain from testifying in Court or become hostile witness after having incriminated the accused in their written statements to the police. Though the disappearance or adverse statement of a witness will not always be for fear of reprisal. If a witness is intimidated or exhorted to give testimony in favour of either party the Court may derive a wrong factual conclusion. One might wonder if the principle of admitting testimony on testimony or article 46 of the Qanun-e-Shahadat and section 32 of the Evidence

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[37] Trankell, 1972, pp. 13-24 and in particular p. 13

[38] Marshall, 1980, p. 9

[39] Levine, Felice J. and June Zouin Tapp 'Eye Witness Identification .....' 1982 at pp. 101, 105 and 107

[40] Levine, Felice J. and June Zouin Tapp, 'Eye Witness Identification .....' 1982 at p. 114

Act applicable to dying declaration, could be extended to intimidated witness testimony.[41]

7.3.2 Confession

In a criminal procedure there cannot be any better evidence than a confession provided it is reliable and well proved. The possibility of a confession being not truthful is always there. A person may confess due to social pressure, promise or threat . Munsterberg says in 1927 that in minor offences promise and threat are still today constant sources of untrue self accusation.[42] It seems that the Courts do not count on the unreliability of confession if it satisfies the legal criteria set out by rules.

There is no written work as to how an accused is treated in practice in the pre-trial stage in Pakistan and Bangladesh. It is important in Pakistan and Bangladesh to do a complete survey on the alleged accused persons and the treatment of the police towards them to intimidate them to confess although such confession would be involuntary. Nevertheless, it is known that police do influence the mind of the alleged accused to confess in front of the magistrate. Such confession might appear to be voluntary though it is not. Whereas the Courts are in general cautious in accepting confession for retribution in a similar fashion to Islamic law, the initial stage for the alleged accused in the police station is very traumatic.

Moreover the amendments brought in Pakistan and Bangladesh regarding accused testimony may with interpretation of the statute make the confession of the statement direct evidence. It is possible

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[41] Zaltzman Nina, 'Admitting Statements of Missing or Intimidated Witnesses: Section 23 of the Criminal Justice Act, 1988 compared with Israeli Experience' in *Criminal Law Review*, 1992, pp. 478-489 at p. 478

[42] Munsterberg, 1927 p. 144

that the judge or the counsel might ask about the voluntary nature of the confession to the accused which would lead to an explicit answer establishing the guilt of the accused.[43]

In Pakistan and Bangladesh hypnosis is not used as an investigative tool as in Los Angeles, Israel[44] and other places in the west. Confession in Islamic law as well as under the Evidence Act and Qanun-e-Shahadat has to be true and voluntary for binding the accused with his statement. Confession obtained by hypnosis cannot be accepted as voluntary[45] and therefore hypnotised confession would not have any value either in Pakistan or Bangladesh.

People's expectations of science often go far beyond realistic limits. One such expectation is that psychology, chemistry or any other science will sooner or later discover an aid, with the help of which people could be forced to tell the truth. Naturally, it would not be a bad idea either if the Courts had access to such aids. There are, however, important circumstances which prevent that truth sera, lie detectors and similar aids will ever reach such an importance as some optimistic enthusiasts maintain. If a person "speaks the truth" it does not necessarily mean that he is describing things that are 'objectively' correct. The concept 'true' is attributed to those assertions which correspond to what is subjectively convinced as established facts. The reliability of what is designated as 'true' does not go beyond the limits of human observational capacity and the accuracy of the memories.[46]

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[43]Kaufman, Fred, *The Admissibility of Confessions*, 3rd ed., Toronto, 1979, p. 46

[44]Yarmey, 1979, p. 176

[45]Notes and Comments, *The Criminal Law Quarterly*, 1978-1979, Vol. 21, pp. 441-444

[46]Trankell, 1972, p. 124

It must be accepted that the best rules of evidence or the use of science will not ensure correct results to reach. The rules of evidence have to be such as assist in reaching correct conclusions within the natural sagacity and experience.[47] This can be achieved with the help of social scientists who would try to raise the standard of morality in the society.

7.4 Women and Female Witnesses

While legal circumstances for women have undergone some significant changes in the past half-century, the dictates of the Qur'an continue to be enormously influential in the moulding of new laws as well as in the personal choices of men and women. While the Qur'an improved the circumstances of the women following the pre Islamic rules, it established a structure in which women were both protected and given clear rights and responsibilities. The situation changed for the worse in the succeeding centuries.[48] There are works both of western and eastern scholars pointing out that the rights ensured to the women by Islam remain largely unimplemented.[49]

It is a clear travesty of the teachings of the Qur'an to treat women as anything other than equals and partners of men.[50] It is mistakenly contended at times that Sharia gives inferior status to women and

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[47]Rangarajan, S., 'Law of Evidence' in *The Indian Legal System* edited by Joseph Minattur, New York, 1978, pp. 263-301 at p. 267

[48]Smith, Jane I, 'Islam' in *Women in World Religions* edited by Arvind Sharma, Albany, 1987, pp. 235-281 at p. p. 242

[49]Levy, R., *The Social Structure of Islam*, Cambridge, 1957, re 1979, pp. 91-134; J. L. Esposito, 'Women's Right .....' 1975 at p. 113; Rounaq Jahan, 'Women in Bangladesh' in *Women for Women*: Bangladesh, Dacca, 1975, p. 27

[50]*First and Second Workshops on the Legal Status of Women with emphasis on the Matrimonial Bill on Formation and Dissolution of Muslim Marriages* 7th-8th Oct and 11-12 Nov, 1987, Gambia National Women's Council and Bureau, The Gambia.

parda restricts her participation in politics.[51] It is false to attribute to Islam the "origins" and "causes" of sexual inequality.[52] It is difficult to deny the fact that Muslim women have suffered morally, materially and politically in male-dominated societies. In many cases the sufferings have resulted from the increasingly one sided interpretation of the Sharia, concomitantly with the rigidity of certain trends of Muslim thought, which was used by the ruling monopolists through history to confine, women to a secluded passive life of subordination to men.[53]

The Supreme Court of Pakistan claimed that the degradation of the prestigious position held in Islam by women, their right as to status and property is, from a jurisprudential aspect, due to a clash between a powerful and old culture of South Asia and South East Asia with Islamic law and culture. Islam withstood the cultural attack, it not only survived but reversed the process of absorption. In this governance of fight for superiority, Muslims also suffered a small dent near about the end, in their adherence to the Maroof (beneficial) part of the Islamic norms. The Islamic laws were not changed but alien customs and customary laws were adopted mostly under the European force and umbrella. This had an adversarial effect in this field. The creation of Pakistan is a manifestation of various other principles, and in reality it is also a reaction to what has been stated above. In Pakistan a jurisprudence has developed and is developing for the *interregnum* wherein a lot of shedding off

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[51] Jahan, Rounaq 'Women in Bangladesh' in *Women in the third world* edited by Laeeq Futehally, Bombay, 1980 pp. 58-67 at pp. 64 and 62

[52] Beck, Lois, 'The Religious Lives of Muslim Women' in *Women in Contemporary Muslim Societies* edited by Jane I. Smith, London, 1980, pp. 27-60 at p. 29

[53] Fyzennessa, Noorunnahar, The Social Status of Women in Islam, *The Dhaka University Studies*, June 1987 Part A Vol. 44 No.1 pp. 141-145 at p. 145

the alien influences is taking place.[54] It is also claimed that the long colonial period perverted and distorted the role and image of women.[55] There could be much truth in the statement, but it is not yet manifest whether the shedding of the alien cultures has raised women's position any higher in the society of Pakistan in the context of Islam, or any attempt has been made to ensure the re-establishment of women's position, irrespective of her economic class, in accordance with true Islam.

It is a sign of honour for women to veil and seclude themselves in Pakistan, Bangladesh and northern India. Muslim and Hindu women veil alike.[56] In contrast, the poor women in Bangladesh earn day in and day out.[57] So do the women in Pakistan. Some women have chosen prostitution as a profession as a way out of poverty in Bangladesh.[58] It is to be remembered that Islam is meant for everybody irrespective of class structure. Verbal respect to Islam and introduction of laws in the name of Islam is not what Islam calls for. Islam calls for a realistic ideal society. The people and the society should be prepared for the acceptance of Islamic law in terms of what is reasonable and probable. The introduction of Hudud laws and article 17 of the Qanun-e-Shahadat restricting the right of female witness testimony has been shown in chapter 6 not to conform with the Islamic norms. To enhance the status of women as accorded in

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[54] Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 at pp. 25-6

[55] Ahmed, Akbar S, *Discovering Islam Making Sense of Muslim History and Society*, New Delhi, 1990, p. 195

[56] Mandelbaum, David G., *Women's seclusion and Men's honour sex roles in North India, Bangladesh and Pakistan*, Tuscon, 1988, pp. 27, 4 and 76

[57] Chen, Marty and Ruby Ghuzari 'Women in Bangladesh: Food-for-Work and Socio Economic Change' in *Women in Contemporary India and South Asia* edited by Alfred de Souza, 2nd ed., New Delhi, 1980 pp. 141-164

[58] Matsui, Yayori, *Women's Asia*, London et al, 1987, pp. 11-13 and 88

Islam article 17 of the Qanun-e-Shahadat and the Hudud laws would require amendments.

It is claimed by the Courts that the general principle of the criminal law in Pakistan is to look at criminal acts by woman with sympathy and compassion. It depends upon the circumstances involved and the approach might differ from case to case.[59] Yet there are cases discussed in chapter 6 showing the repressive judgements furnished by the Court. Charles Kennedy has tried to show that in Zina cases gender bias present in the implementation of the provision of section 10(2) favours women.[60] He argues that the Courts have not convicted the women of Zina if there is a 'reseonable doubt' concerning whether the woman was forced to submit to the crime. Though he accepts that thirty percent of all convictions under section 10(2), i.e. Zina originate in 10(3), i.e. Zina bil Jabr cases. The reason for women bringing charges under section 10(3) according to him is their fearing conviction under section 10(2).

It is an accepted principle of criminal law that an individual must be secured from a wrongful conviction even at the expense of the necessitated wrongful acquittals of many dangerous criminals. The latter standard of proof which requires a preponderance of evidence is grounded upon a different principle. In criminal cases this standard is aimed to achieve, in the long run, a preponderance of factually correct decision.[61] An accused must be considered innocent till proved guilty.[62] Prior to the conviction of the accused any doubt as to his guilt may be judicially eliminated in a publicly

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[59] Shabbo v. State PLD 1990 SC 1083 at p. 1086

[60] Kennedy, 'Islamic Legal Reform...' 1991 at p. 49

[61] Stein, 1990, p. 266

[62] Cross, 1985, pp. 114-5

scrutinizable way.[63] The bad character of the accused, e.g. the mere fact that he had previously committed a crime, cannot be used as evidence against him. Previous misdeeds must not undermine the accused's right to equal standing and he must be treated like any innocent person.[64] The accused may call witnesses to character to unveil the previous records of a victim whereas she is tied by law not to avail of the same kind of opportunity. This theory gets repressive when a victim of a crime is put in the dock to weigh balance in favour of the accused. If the victim of a crime is a woman, in societies like Pakistan and Bangladesh she does not only loose her honour from the crime, but also from the process of law by virtue of section 155(4) of the Evidence Act and article 151(4) of the Qanun-e-Shahadat which weighs in favour of the accused. The law should be changed so as to bring an equality between the victim of the crime and an accused. If the accused questions the character of the victim she should be allowed to impeach the character of the accused as well. But it will make little difference to a society like Pakistan and Bangladesh because however much she might impeach the character of a man in a law Court, she is considered by the society as a fallen woman. In this respect it is to be noted that in theory conviction can be based on a sole dying declaration even of a woman if proved. In contrast in Zina bil jabr or rape cases, though the victim can be cross examined, she is scrutinised as an accomplice. Even if she had to trap an accused or a man of immoral character for any reason, she would be thoroughly scrutinised virtually as an accomplice; her life would be wrecked in the search for clues of immorality, and the rules of trap witnesses will not apply to her. The

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[63] Stein, 1990, p. 41
[64] Stein, 1990, p. 413

accused can avoid evaluation being made of him by simply exercising his right to silence and refusing to testify. If the only evidence of the accused's intention is the testimony of the accused himself, the issue of credibility will largely determine the issue of guilt.[65]

In Islamic law, to establish a claim the complainant or the plaintiff is burdened with having to bring just witnesses. But as at times right of individuals are at stake the moral standard is lowered. The presumption in Islamic law is probably that a just witness will not give in to intimidating or extortion. The requirement of corroboration in relation to victims testifying in trials for sexual offences are most questionable,[66] e.g. administering drugs to facilitate sexual intercourse. It is an accepted principle that the intensity of the persuasion of the judge to find the fact is often affected by the kinds of witness one is and the preponderance of probability of the event. In hard cases, e.g. rape and Zina bil jabr where the probability of the relevant facts cannot be determined, the party, i.e. the victim, carrying the burden of proof could simply lose her case.[67] The risk involved in Zina case is that a man may claim to be married while he is not; in that case he will be stoned to death although he should have been flogged only. For example, a man or a woman confessed to having committed Zina. S/he *admits* to being married. Admission is not a confession, but for the purposes of Zina admission regarding a civil or social act will take the form of criminal act. S/he on the basis of the admission can be stoned. Nobody can effectively prove Zina as it is impossible for a third

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[65] Jackson, John, 'Questions of Fact .....' 1983 at p. 98

[66] Stein, 1990, p. 408

[67] Stein, 1990, p. 85

party to see the penetration. It is provable from circumstantial evidence only, e.g. blood or semen, etc. nobody can ever be punished by stoning to death if the law is strictly followed. If someone had to exhibit penetration to prove Zina it would be Zina in the legal sense but the whole theory of Zina is based on the social assumption of wrongful enjoyment. Empirical study is needed to find out in what circumstances rape or Zina bil jabr take place.

The International Women Lawyers Conference convened in Lahore and led by the Women Lawyers Association urged the Pakistan government to sign the United Nations Convention on the Elimination of Discrimination against Women, and to support the establishment of a "non governmental international commission to recommend a uniform and universal code of personal laws under Islam with equal representation of women and embodying these in specific provisions of law in the light of international norms and standards of justice, peace and equity. Not all segments of the country reject Pakistan's conservative proposals. The Majlis-e-Khawatin-i-Pakistan, a womens group, rejects the validity of the United Nations Convention on the Elimination of Discrimination against Women by claiming it is repugnant to Islam.[68]

7.5 Concluding Remarks

Jonathan Cohen says in another context that disagreement about the norms of proof tends to generate a much deeper sense of injustice. This is because of the cognitive belief in a universal cognitive competence whereby, given a proper presentation of all relevant

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[68] Weiss, Anita, 'Implications of the Islamisation Program for Women' in *Islamic Reassertion in Pakistan* edited by Anita Weiss, New York, 1986, pp. 97-113 at p. 104

evidence about any particular factual issue, either every normal and unbiased person would come to the same conclusion about it or at worst everyone would agree that it was an issue about which the norms of proof are indeterminate and reasonable people might venture different conclusions. That belief supports the view that if well informed people continue to express serious disagreement about any norm of proof, someone is being unreasonable or dishonest.

This reasoning can equally be applied to the question of female witness testimony in Pakistan. This leads to the question of whether both the judges and womens' group in Pakistan are reasonable to venture different conclusions. If the womens' group are well informed people about the norm of proof in Hadd case, because they seriously disagree whereby would the legislators and the judges be then by Cohens standard, unreasonable or dishonest, or could it be other way round? One has to wait to see who is unreasonable or dishonest regarding the norm of proof laid down in the Hudud laws.

Jonathan Cohen further asks whether the traditional system of evidence by producing generally acceptable verdicts on facts, can a legal system ensure that in the long term it may continue to retain the respect of the informed public. Its survival depends on the extent of the people's belief in the accuracy of the trial outcomes not the actual accuracy specially in criminal cases. He continues that in different cultures different kinds of fact finding procedure will be appropriate with prevalent ideas about the normal source of knowledge.[69] One may argue in the present culture of Pakistan whether the new legal system of norm of proof is appropriate with prevalent ideas about the normal source of knowledge, i.e. juristic

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[69]Cohen, 'Freedom of .....' 1983 at pp. 4-5

Islamic law. It is evident that the womens' group in Pakistan feel that their right have been grossly violated. But regarding the prevalent ideas of the citizen in Pakistan some research is needed. For many women the revision of Pakistan's law of Evidence Act confirmed their worst fears. The draft submitted by the Council of Islamic ideology, supported by the vast majority of religious leaders and finally passed, implemented the traditional Islamic legal viewpoint that the testimony of two women equals that of one Muslim male.[70]

The adverse effect of Islamisation on women has made the women of Bangladesh cautious. It is claimed that the resistance of the liberal and secular forces in Bangladesh has helped to moderate the extent to which official Islamisation can be translated into a direct attack on women's right as was possible in Pakistan and Iran.[71] But it could also be said that the people of Bangladesh are deeply observing and trying to find out the true characteristic of Islam as far as women are concerned. It is possible for this reason that official repression in the name of Islam has not taken place in Bangladesh as yet, although in the every day life the patriarchy continues.

Legal machinery can play only a limited role in the social and economic emancipation of women. Although legal reform cannot by itself get rid of the gender injustice it may control it to some extent. Until equal rights for women are made a reality through social attitude and practice, there cannot be any change in women's

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[70]Esposito, 1984, p. 175

[71]Kabeer, Naila, 'The Quest for National Identity : Women, Islam and State in Bangladesh in *Women, Islam and the State* edited by Deniz Kandiyoti, London, 1991, pp. 115-143 at p. 140

status.[72] It may as well be argued that gender inequal law should also not affect the social reality of women's freedom, as it in itself cannot enslave women. If it does, that is because women are still subjugated. There is enough scope within the framework of the Qur'an and the Sunna to absorb whatever changes or modifications may be necessary for present day requirements.[73] It is vital that women continue to theorise about the meaning of equality and question equality as a goal for women; that women continue to expose and denounce their oppression, that feminists continue to question women's participation in the legal process and raise the spectre of co-optation; that women continue to struggle to be heard within the male discourse and struggle to create a women's discourse. In this way, through feminist process and methodology, women will be able to operationalize equality.[74]

It seems that the re emergence of Islam as a central theme in Pakistan's politics has resulted in a focusing on questions and issues of Islamic identity and ideology which will not easily disappear.[75] The foundation of the socio-political order in Islam could only be the individual, who is endowed with a certain type of character. Qur'an aims at making men into Salehin (the righteous one), Muttaqin (self controlled one), Muttehirin (those who reform the society) and Sadiqueen (those who relentlessly adhere to the call of truth), and it

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[72] Midha, Seema, 'Law and Social Justice' in *Women in India Equality, Social Justice and Development* edited by Leelamma Devasia and V. V. Devasia, New Delhi, 1990, pp. 69-78 at p. 75

[73] Zakaria, Dr. Rafiq, Inaugral speech, in *National Seminar on the Status of Women in Islam*, New Delhi, 18th and 19th July, 1983, p. ix

[74] Marjury, Diana, 'Strategizing in Equality' in *At the Boundaries of Law Feminism and Legal Theory* edited by Martha Albertson Fineman and Nancy Sweet Thomadsen, New York and London, 1991, pp. 320-337 at p. 331

[75] Esposito, John L., 'Pakistan : Quest for Islamic Identity' in *Islam and Development Religion and Sociopolitical Change* edited by John L. Esposito, New York 1980, pp. 139=162 at p. 162

is out of this community of men that it wants to make a nucleus of that organised group of God fearing people who will, by their deed and thought, provide an example to the world even as the Prophet has been an example to them.[76] But to insist on a literal implementation of the goal and rules of the Qur'an, shutting one's eyes to the social change that has occurred and that is so palpably occurring before the society, is tantamount to deliberately defeating its moral-social purposes and objectives.[77] The principles of Islam should be determined by the words and actions of men nearest in time to the appearance of religion who received it in the simplicity in which it was transmitted from the one who professed the religion.[78] A process of juristic development extending over more than two centuries separated the Qur'an from the classical formulation of Islamic law according to different Sunni and Shiite schools, and the general Qur'anic norms and injunctions suffered progressive dilution during this time. The hall mark of early Muslim jurisprudence, or at least the jurisprudence of the Sunni majority, was that the principle remained valid unless and until it was expressly superseded by the dictates of Islam. Hence the standards and criteria of pre Islamic customary law were carried over into Islam and exercised dominant influence in the development of the Islamic legal system. The modicum of explicit Qur'anic legal rulings on the status of women were naturally observed, but outside this the tendency was to interpret the Qur'anic provisions in the light of the prevailing standards of the tribal law.[79] The debate as to the nature

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[76]Brohi, A K, *Fundamental Law of Pakistan*, Pakistan, 1958 p. 755

[77]Rahman, Fazlur, *Islam and Modernity*, Offprint SOAS Library, p. 19

[78]Adams, C. Muhammad, *'Abduh : Doctrines Islam and Modernism in Egypt*, New York, 1968, p. 22

[79]Coulson and Hinchcliffe, 'Women and .....' 1978 at p. 38

of Islamic law has really just begun and the tensions apparent in the Muslim legal world will be resolved by the Muslim communities themselves drawing upon their remarkable legal tradition and history.[80]

To summarise the conclusion it could be said that the Evidence Act introduced during British occupation of India reflected to a large extent the existing law of that time. The law of witness testimony and confession were hardly affected by the introduction of the Evidence Act, as the practice prevalent in the society continued with the exigencies of time and social change. The theory of Islamic law on women has been interpreted in accordance with the patriarchal society and their norms. The women of higher strata was secluded by this law although in practice this was hardly achievable specially for the poor women. The introduction of section 17 of the Qanun-e-Shahadat and the Hudud laws are in some form the assertion of patriarchy in the name of Islam the standard of which is hardly attainable. This is manifest from almost all the cases disposed of by the Courts in Pakistan as Tazir offences. Tazir law is similar to the criminal law of Bangladesh. The stand taken by the Evidence Act as far as the women are concerned reflects reality. Therefore, the Evidence Act does not contradict with Islamic law in most of the matters.

7.6 Recommendation for Further Research

It is necessary to continue this study on law of evidence with field work conducted to find out about the following areas ----

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[80]Pearl, David, *A Textbook of Muslim Personal Law*, 2nd ed., London et al, 1987, p. 245

1. The indigenous system of law of evidence that continues in the villages and remote areas of Pakistan and Bangladesh which is understood to be a blend of customary and Islamic law.

2. The reasons for becoming hostile witness, influence of the investigating officer while recording the statement of the witness for the first time, the way first information report is made and intimidation by the opposite party.

3. Child witness testimony and their ordeal in Courts and out of it, percentage of child abuse and various ways of abusing children etc.

4. Expert witness and dimensions of expert opinion, rule of recruitment and training in medical jurisprudence of experts.

5. The evidentiary value of the statement of the supposed male accused *vis a vis* treatment by the police, the magistrate and members of the judicial custody and opposition lawyers.

6. There should be a separate study for female accused in the same manner as male accused.

7. The condition under which rape or Zina bil jabr takes place, e.g. the breach of promise to marry, concealed marriages, revenge of family honour and adventures in youthful folly; evidentiary value of consent in a supposed case of Zina,

8. The rate of consumption of alcohol and other drugs, awareness of alcohol, drugs and other related problems and effect of Hadd law on commodity and commerce.

9. The effect of Hadd law on theft, highway robbery, smuggling and other related issues.

10. The effect of Hadd on the law of marriage and divorce and the way of proving them.

11. The aspirations, if any, of the village society to identify themselves with the traditional Islamic law of evidence with its rigid interpretation and

12. The psychology of a witness or an accused to behave in a particular way. This study needs to be carried out by a psychiatrist or a psychologist.

Statutes and Regulations

Statutes and Regulations that were applicable to all India before partition

Charter of 1726 [Charter of 24th September 1726 in the 13th year of the reign of King George I]

Charter of 1753 [Charter of 8th June granted by King George II]

Regulating Act 1773 [13 George III Cap LXIII]

Regulating Act 1781 [21 George III Cap LXX]

Bengal Regulations IV of 1793

Bengal Regulations IX of 1793

Bengal Regulations IX of 1796

Bengal Regulations VIII of 1803

Regulation XV of 1803

Bengal Regulations III of 1812

Bengal Regulations XXIII of 1814

Bengal Regulations XXIV of 1814

Regulation I of 1818

Bombay Regulations IV of 1827

Bombay Regulations XII of 1827

Bombay Regulations XIII of 1827

Madras Regulation III of 1802

Madras Regulation IV of 1802

Madras Regulation V of 1802

Madras Regulation VII of 1802

Madras Regulation VII of 1809

Madras Regulation XII of 1809

Madras Regulation IV of 1816

Madras Regulation V of 1816

Madras Regulation VI of 1816

Madras Regulation VII of 1816

Madras Regulation X of 1816

Madras Regulation XIV of 1816

Madras Regulation IV of 1821

Madras Regulation I of 1825

Madras Regulation VII of 1827

Madras Regulation VIII of 1827

Madras Regulation VI of 1829

Madras Regulation VIII of 1832

Act X of 1835

Act XIX of 1837

Act I of 1840 [Madras]

Act V of 1840

Act IX of 1840

Act VII of 1841

Act VII of 1844

Act XV of 1852

Act XIX of 1853 [Bengal]

Act II of 1855

Act X of 1855

Act VIII of 1859

Act XXV of 1861

Act XVII of 1862

Act XV of 1869

Penal Code, 1860 [Act XLV of 1860]

The Divorce Act, 1869 [Act IV of 1869]

Evidence Act, 1872 [Act I of 1872]

The Majority Act, 1875 [Act IX of 1875]

The Guardianship and Wards Act, 1890 [Act VIII of 1890]

Code of Criminal Procedure [Act V of 1898]

Code of Civil Procedure [Act V of 1908]

Code of Criminal Procedure (Amendment) Act, 1923 [Act XVIII of 1923]

Contempt of Courts Act [Act XII of 1926]

The Child Marriage Restraint Act, 1929 [Act XIX of 1929]

Indian Independence Act, 1947[10 and 11 Geo, 6, Ch. 30]

Statutes applicable to both Pakistan and Bangladesh

The Public Gambling Act, 1867 [Act III of 1867 in Pakistan; Bengal Act II of 1867 in Bangladesh]

Dissolution of Muslim Marriages Act, 1939 [Act VIII of 1939]

Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 [Governor General Order No. 20 of 1947]

Governor General Order No. 4 of 1949

Muslim Family Laws Ordinance, 1961[Ordinance VIII of 1961]

Statutes applicable to Pakistan

The Constitution of the Islamic Republic of Pakistan [1973]

The Prohibition (Enforcement of Hadd) Order, 1979 [President's Order No. 4 of 1979]

The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 [Ordinance VIII of 1979]

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979 [Ordinance VII of 1979]

The Offences Against Property (Enforcement of Hudood) Ordinance, 1979 [Ordinance VI of 1979]

The Prohibition(Enforcement of Hadd) (Amendment) Order, 1980 [President's Order No. 5 of 1980]

Property (Enforcement of Hudood) (Amendment) Ordinance, 1980 [Ordinance XIX of 1980]

Offences of Zina (Enforcement of Hudood) (Amendment) Ordinance, 1980 [Ordinance XX of 1980]

Offence of Qazf (Enforcement of Hadd) (Amendment) Ordinance, 1980 [Ordinance XXI of 1980]

Qanun-e-Shahadat [Order X of 1984]

Code of Criminal Procedure (Amendment) Ordinance, 1985 [Ordinance 12 of 1985]

Enforcement of Shari'ah Act, [Act No. X of 1991]

Criminal Law (Amendment) Ordinance, 1990 [IV of 1990]

Criminal Law (Second Amendment) Ordinance, 1990 [VII of 1990]

Criminal Law (Third Amendment) Ordinance, 1990 [VIII of 1990]

Criminal Law (Fifth Amendment) Ordinance, 1990 [XV of 1990]

Criminal Law (Amendment) Ordinance, 1991 [I of 1991]

Criminal Law (Second Amendment) Ordinance, 1991 [XVIII of 1991]

Criminal Law (Fourth Amendment) Ordinance, 1991 [XXX of 1991]

Criminal Law (Sixth Amendment) Ordinance, 1991 [XLII of 1991]

Criminal Law (Amendment) Ordinance, 1992 [IV of 1992]

Criminal Law (Second Amendment) Ordinance, 1992 [VI of 1992]

Criminal Law (Third Amendment) Ordinance, 1992 [X of 1992]

Criminal Law (Fourth Amendment) Ordinance, 1992 [XI of 1992]

Statutes applicable to Bangladesh

Evidence Act, 1872 [Act I of 1872]

Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972 [President's Order No. 48 of 1972]

The Constitution of the People's Republic of Bangladesh [1972]

Marriage and Divorce Registration Act, 1974[Act LII of 1974]

Proclamations Order No. 1 of 1977

The Code of Criminal Procedure (Amendment) Ordinance, 1978 [Ordinance XLIX of 1978]

The Child Marriage Restraint (Amendment) Ordinance, 1984 [Ordinance XXXVIII of 1984]

Constitution (Eighth Amendment) Act, 1988 [Act XXX of 1988]

Statutes of Malaysia

Evidence Act, 1950, [originally Ordinance 11 of 1950, later revised as Act 56 of 1971], Malaysia

Enactment of the Syariah Court [Enactment No. 2 of 1991], Kelantan, Malaysia

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Abdul Haleem v. The State 1984 P Cr. L J 611 [Karachi]

Abdul Haleem v. The State 1984 P Cr. L J 2791 [Karachi]

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Abdul Hamid v. The State PLD 1980 Peshawar 25

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Abdul Rashid alias Sheeda v. The State 1986 P Cr. L J 177 [Lahore]

Abdul Rashid v. The State 1986 P Cr. L J 621 [Karachi]

Abdul Razaq and another v. The State 1992 P Cr. L J 1861 [Shariat Court (Azad J&K)]

Abdul Razzak v. The State 1985 P Cr. L J 1885 [Lahore]

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Allah Bakhsh v. The State 1985 P Cr. L J 2152 [Lahore]

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Allah Dad and 4 others v. The State 1981 P Cr. L J 46 [Lahore]

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Ghulam Ali v. State PLD 1986 SC 741

Ghulam Farid v. The State and others 1983 P Cr. L J 777 [Lahore]

Ghulam Ghaus v. The State 1983 P Cr. L J 1264 [Karachi]

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Glossary

Ada al Shahada	obligation to testify
Adala	competent witness
Adalat	Court, justice, equity, to administer justice
Adil	truthful witness
Adl	truthful
Ahad	literally meaning one, here testimony by a single witness
Amil al Suk	market inspector
Amin	a trustee, treasurer
animus	intent
(al) Bayyina	evidence
Aql-Qatay'i	rational intelligence
Arash	compensation for grievous injury
Ayah	verses of the Qur'an
Badshah	a king, a sovereign
Bayanud-Darurat	estoppel
bonafide	good intention
burqa	outer cloak for women
challan	act of sending up for trial
coram non judice	the presence of one who is not a judge
corpus	the body
corpus delicti	the body on which the crime was committed
cursus curiae est lex curiae	the practice of the Court is the law of the Court

dinar	a currency
Diwani Adalat	a Court of justice, Civil Court
Diyat	damages for unlawful killing
et al	and others
falsus(m) in uno falsus(m) in omnibus	false in one thing, false in all
Fard al Ain	individual obligation
Fard ala al Kifaya	collective obligation
Fasiq	reprobate
Fatawa	plural of Fatwa
Fatwa	jurists opinion
faqir	pious person
Faujdar	a Court having military and police duties and associated with revenue administration
Faujdari Adalat	Criminal Court
gaddinashin	inherited religious position
ghee	melted butter
Hadd	fixed punishment
Haqq Allah	public right
Haqq Adami	private right
Hudud	plural of Hadd
Hudood	different spelling for Hudud
Hadith	sayings, practices and the things approved by the Prophet, Traditions
Harabah	highway robbery
Harem	ladys' quarter
Haveli	palace
Hijab	veil

Hijra	Islamic lunar calendar
Hirz	custody
Hudud	plural of Hadd
Ijtehad	independent reasoning
Ijma	consensus of opinion among the jurists
Ila	a kind of divorce
In(اِنْ)	if
in verbatim	word for word
interregnum	the time during which an office is vacant
inter se	between or among themselves
Iqrar	admission and confession
Izhar	examination
Jatiyo Sangsad	National Assembly or Parliament
Jilbab	outer cloak for women
Jinaya	criminal law of Qisas and Diyat
Jirah	cross examination
Jurh	grievous hurt
Khalifa	caliph
Khan	nobles, an office
Khan-i-Khanan	chief of nobles or office
Khilafat	caliphate
Khula	a kind of divorce initiated by the woman
Kotwal	magistrate of a town
Li'an	mutual imprecation
Majlis	here same as Majlis-e-Shura
Majlis-e-Shura	consultative assembly

Mahirin-e-Fan	particular branch of science
Maroof	beneficial, good
Maslaha	public interest
Masjid	mosque
mens rea	guilty mind
Mir Adl	one who executes the judgement
Moulvi	learned scholar
Muhtasib	market inspector
Mufassil towns	small towns
Mufti	learned scholar
Muhsan	married person
Mursal	incomplete Hadith
Mutawatir	frequently occurring Hadith among the first three generations of the Muslims
Muttaqin	self controlled one
Mutteherin	those who reform the society
Muzakki	one who examines the truthfulness
of a	witness
Naskh	abrogation
Nawab	a title
Nizamat	regulation, arrangement
Nizamat Adalat	Criminal Court
Nizam-i-Islam	Islamic State
obiter dicta	things said by the way
panchayat	village council
par	state of equality
parda	screen
pardanashin	one who screens from the public

per	by, through
per se	by itself
prima facie	at first glance
propria vigore	by its own force
pro(s) and con(s)	for and against
Qadhf	accusation of illicit relationship
Qadi	judge
Qadi al Quddat	the chief judge
Qanun-e-Shahadat	the law of evidence
Qarinah	circumstantial evidence
Qatiatun	conclusive proof
Qatl	killing
Qatl-i-amad	intentional killing
Qawad	Jurh, grievous injury
Qazf	accusation of Illicit relationship
Qazi	judge
Qazi Adl	truthful Judge
Qias	analogical deduction of the jurists
Qias-i-Jali	clear reasoning
Qisas	retaliation
qua	as
quantum	how much
quasi	in the nature of, seemingly
Qur'an	the Holy Book of the Muslims
Rajm	stoning to death
ratio decidendi	the reasons for decision
Ridda	apostasy
Sadar Adalat	Chief Civil Court

Sadiqueen	those who relentlessly adhere to the call of the truth
Sahebul Majalis	associate of the judge
Sahib al Suk	market Inspector
Salehin	the righteous one
Saugand	oath
Sariqah	theft
Shahada ala Shahada	testimony on testimony, indirect testimony
Shahid	witness
Shahid Adl	truthful witness
shalish	arbitration
Sharia	Islamic law
Shariah	Islamic law
Shariat	Islamic law
Shurb al Khamr	drinking
Shurta	police
sic	so thus, a word put in brackets in a quoted passage to confirm that the quotation is exact though its correctness or absurdity would suggest that it is not.
Sima'i Shahadat	hearsay evidence
simpliciter	simply, directly
sine qua non	without which (it could) not (have happened)
status quo	the state of affairs at present
Sultan	ruler
Sultana	lady ruler

Sunna	practices of the Prophet
Sura	chapters of the Qur'an
Tahammul al Shahada	bearing testimony
Takhayyur	considering the view of a certain jurist better than the other jurist
Takadim	distance of time
Talfiq	amalgamating or patching of ideas of different schools of thought
Tawatur	universal testimony
Tazir	discretionary punishment
(al) Tazir bil Qatl	the death penalty in the form of discretionary punishment
Tazkiya	purity, here same as Tazkiya al Shuhud
Tazkiya al Shuhud	the process of examining the truthfulness of a witness
Thana	police station
Ulema	learned scholars
Uqubat	criminal law
vice versa	the other way round
vis a vis	in a position facing each other, opposite to, in relation to, as compared with
Waqf	endowed property
Zenana	ladys' quarter
Zina	illicit sexual relation
Zina bil Jabr	coerced illicit sexual relation

Abbreviations

@	alias
&	and
AC	Appellate Court
AD	Appellate Division of the High Court
A. D.	anno domini
ADDC	Additional Deputy Commissioner
A. H.	after hijra
AIR	All India Report
All	Allahabad
Art.	article
Arts.	articles
AJK	Azad Jammu and Kashmir
A J & K	Azad Jammu and Kashmir
Aug.	August
Azad J&K	Azad Jammu and Kashmir
BCR	Bangladesh Case Report
BLD	Bangladesh Legal Decision
BSCR	Bangladesh Supreme Court Report
BSRS	Bangladesh Shilpa Rin Shangstha
BJ	Baghdadul Jadid
Bom.	Bombay
Cal.	Calcutta
Cl.	clause
Commr.	Commissioner
C. P. C.	Code Civil Procedure
Cr. L. J	Criminal Law Journal
Cr. P. C.	Code of Criminal Procedure

C.W.N.	Calcutta Weekly Notes
d.	died
DAC	Dacca now respelled as Dhaka
D.B.	Division Bench
Dec.	December
DLR	Dhaka Law Report
ed.	edition
e.g.	for example
ed.	edition
E.P.I.D.C.	East Pakistan Industrial Development Corporation
etc.	etceteras
FB	Full Bench
FC	Federal Court
Feb.	February
f.n.	footnote
FSC	Federal Shariat Court
Govt.	government
H.	Hijra
HC	High Court
HCD	High Court division of the Supreme Court
HD	High Court Division of the Supreme Court
IA	Indian Appeals
i.e.	that is
ILR	Indian Law Report
imp.	impression
I. O.	Investigating Officer
Jan.	January
J&K	Jammu and Kashmir
Kar.	Karachi

Lah.	Lahore
LR	Law Report
Mad.	Madras
Nag.	Nagpur
No.	number
Nov.	November
NP	no place mentioned
NY	no year mentioned
Oct.	October
Ord.	Ordinance
ors.	others
p.	page
Pak	Pakistan
p.b. h.	peace be upon him
p.b.u.h.	peace be upon him
P. C.	Penal Code
P Cr. L J	Pakistan Criminal Law Journal
PC.	Privy Council
P. P. C.	Pakistan Penal Code
Pesh.	Peshawar
PLD	Pakistan Legal Decisions
pp.	pages
pub.	publication
re	reprint
Reg.	Regulation
Rs.	rupees, currency
S.	Section
SC	Supreme Court
SCMR	Supreme Court Monthly Report

Sept.	September
Sh.	Shariat
Sh. App. B.	Shariat Appellate Bench
SOAS	School of Oriental and African Studies
Ss.	sections
USA	United States of America
UK	United Kingdom
v.	versus
vs.	versus
vol.	volume
W. P.	West Pakistan

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